IN THE

Supreme Court of the United States

LARY GARA,
Defendant-Appellant,

vs.

THE UNITED STATES,
Plaintiff-Appellee.

Appeal from the United States Court of Appeals for the Sixth Circuit.

TRANSCRIPT OF RECORD

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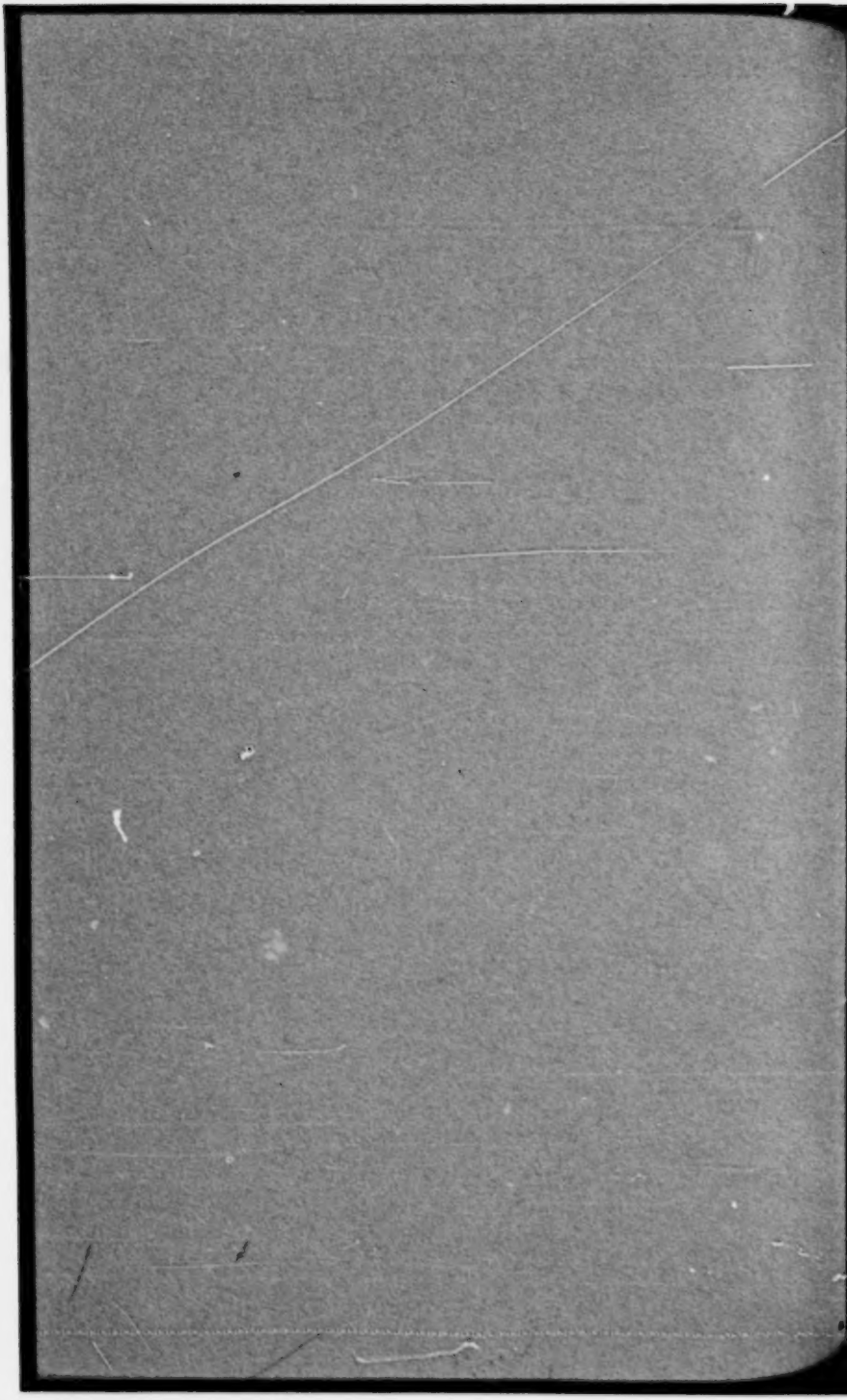

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IN THE

District Court of the United States

FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

No. 10917

LARRY GARA,

Defendant-Appellant,

vs.

THE UNITED STATES,

Plaintiff-Appellee.

CAPTION

Northern District of Ohio, Western Division, ss:

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio in the cause and matter hereinafter stated. Said action was commenced on the 4th day of January, A. D. 1949, and proceeded to final disposition on the 6th day of May, A. D. 1949, and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: Honorable Frank L. Kloeb, United States District Judge.

No. 9501 Criminal

United States of America
vs.
Larry Gara

INDICTMENT

(Sec. 12(a), Selective Service Act of 1948)
(Filed Jan. 4, 1949)

The grand jury charges that:

At various times between the 24th day of June, 1948, and the 8th day of November, 1948, the exact date, or dates, or instances being unknown to the members of this grand jury, within the jurisdiction of this court, Larry Gara did knowingly counsel, aid, or abet other individuals, the names of whom are unknown to this grand jury, to refuse, or evade registration or service in the Armed Forces of the United States and to refuse to comply with the rules, regulations or directions of the Selective Service Act of 1948.

SECOND COUNT

On or about the 8th day of November, 1948, at Bluffton, in the Northern District of Ohio, Western Division, Larry Gara knowingly counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948.

A true bill.

Beatrice Spieker, Foreman.

Gerald P. Openlander,
Assistant United States Attorney.

TRANSCRIPT
(Filed May 12, 1949)

Be it remembered, that upon the trial of the foregoing cause, at the October, 1948, Term of said Court, before Honorable Frank L. Kloeb, Presiding Judge, and a jury duly impaneled, the following proceedings were had, to-wit:

Commencement of trial: March 9, 1949.

Appearances:

For the Plaintiff: Gerald P. Openlander, Esq., Assistant United States Attorney.

For the Defendant: Francis Heisler, Esq., of Chicago, Illinois; and Gustavus Ohlinger, Esq., of Messrs Ohlinger, Koles, Wolf & Flues, of Toledo, Ohio.

Mr. Openlander: If Your Honor please, the government desires to dismiss the first count of the indictment. We are proceeding solely upon the second count.

The Court: I shall proceed upon that theory.

Mr. Heisler: The record may so show.

Mr. Openlander: Yes, the record may so show that the government dismisses the first count of the indictment.

Thereupon, the following proceedings were had upon voir dire:

Mr. Ohlinger: That is the primary tenet of this Quaker Sect. You have all heard what I have read, and you appreciate that, and that is going to be a very important matter in this case. Possibly I ought to read it again so that you can get it clearly in your mind, what they believe:

> "We utterly deny all outward wars and strife and fightings with outward weapons, for any end, or under any pretense whatsoever. This is our testimony to the whole world. The Spirit of Christ, by which we are guided, is not changeable so as to allow us to do this thing of evil at all, or move us to do it; and we certainly know and testify to the world that the Spirit of Christ, which leads us unto all truth, will never move us to fight and war against any

man with outward weapons, whether for the Kingdom of Christ or for the kingdom of this world. Therefore we cannot learn war any more."

That is a fundamental tenet of this sect I want you to know about.

Now I want to ask of you, Ladies and Gentlemen, whether you have any prejudice against a defendant that believes that? Do any of you believe what I have just read? I take it that your answers to both questions are no, that none of you feels any prejudice against the defendant in this case by reason of the fact that he conscientiously believes what I have just read.

I further take it from your silence that none of you believe yourselves what I have read. It is contrary to your belief, each and every one of you. You do not harbor any such belief, and you are opposed to that belief, and you are positive in your convictions against what I have read.

Mr. Openlander: I am a little bit afraid, Mr. Ohlinger, you are going too far.

The Court: They have not said they are opposed to that belief. That is not the situation.

Mr. Ohlinger: I think that is a proper question.

The Court: The question was whether or not they acceded to that belief.

Mr. Ohlinger: Yes.

The Court: That you may put; not whether they are opposed to it.

Mr. Ohlinger: All right. I beg to differ with Your Honor, and if I may have an exception I would like to take it.

The Court: You may.

* * * * *

Mr. Openlander: Of course, if the court please, I am a little bit afraid that these questions Mr. Ohlinger is asking now, and reading from the beliefs of the Quaker Sect, may leave the impression in the minds of the jury that this defendant is being prosecuted because he believes in these principles. I am hearing the statement of these principles,

as is the jury, for the first time. I have had no opportunity to study them. But as I hear them from Mr. Ohlinger, there is nothing in those principles which would motivate Mr. Gara to do what he did in this instance; and of course, above all else, there is no thought in t' › mind of the government that we are going to prosecute Mr. Gara and are proceeding to prosecute him because he believes in these things. There is no conflict at all. It will be the government's contention in this case that the beliefs as set forth from these excerpts from the religion that Mr. Ohlinger has read are entirely consistent with, perhaps, the beliefs of a lot of people; but, at the same time, that they are inconsistent with the prosecution in this case, or the theory of the prosecution in this case, because it is the government's claim—and I think we all appreciate the fact—that there can be no conviction here because of what Mr. Gara believes, but because of what he did over and above what is set forth in these tenets.

So I believe the members of this panel should understand at the outset, so far as I am concerned, and so far as the government is concerned, it is perfectly all right for Mr. Gara to believe everything that Mr. Ohlinger has read here from these tenets, and there will be no quarrel on my part with that; and if Mr. Gara had believed in those things, he would not be here to-day; and he would not be here to-day if he had not gone further—

Mr. Heisler: Objection to that statement. It is improper before a jury to state that a man would not be here if he would not have done anything else but what he believes.

The Court: I believe, gentlemen, we are getting off the track. It is going to be impossible to secure a jury—I think you recognize that—comprised of people who believe in the tenets of this particular religion, because you get a composite picture of people; they adhere to different sects and beliefs; and it occurs to me perhaps the questions counsel is putting would seek to elicit from the jury whether they are in accord with those beliefs. In order to

be in accord, they would have to be members of this particular sect, would they not, Mr. Ohlinger?

Mr. Ohlinger: I don't think so, Your Honor.

The Court: I cannot allow it to go that far because obviously we could not get a jury so constituted.

Mr. Ohlinger: Now referring to what Mr. Openlander has just said, he said there can be no conviction for simply a belief in these tenets that I have read.

The Court: The court will say to counsel that the defendant is not on trial for his beliefs.

Mr. Ohlinger: Will the District Attorney accede that the defendant cannot be convicted because he performed acts in support of the principles set forth here?

Mr. Openlander: Not at all; because a man might very well believe in these things, as I pointed out before when Mr. Heisler objected—now the question has been asked me direct—a man might very well believe in these tenets, and he would never be prosecuted; but the minute that he performs acts in violation of the laws of the United States, now we are getting around to the question, of course, as to whether or not the fact that his religion—whether he may go beyond his religion and the teachings of the religion, and, using that as a basis, violate the laws of the United States. I don't think they are consistent. I don't think there is any connection between the two.

The Court: You may proceed with your next question, and I will see. Do not get too far away from the main issue here.

* * * * *

Mr. Ohlinger: The further tenets of this organization to which Mr. Gara belongs are these:

"Friends are urged:

"1. To support Young Friends and others who express their opposition to conscription either by non-registration, or by registration as conscientious objectors. We warmly approve civil disobedience under Divine Compulsion as an honorable testimony fully in keeping with the history and practices of Friends.

"2. To recognize that the military system is not consistent with Christ's example of redemptive love, and that participation, even in a non-combatant capacity, weakens the testimony of our whole Society. Nevertheless, we hold in respect and sympathetic understanding all those men who in good conscience choose to enter the armed forces.

"3. To extend our religious concern and assistance to all conscientious objectors who may fall outside the narrow definition of the Selective Service Act of 1948.

"4. To avoid engaging in any trade, business, or profession directly contributing to the military system; and the purchase of government war bonds or stock certificates in war industries.

"5. To carefully consider the implication of paying those taxes, a major portion of which goes for military purposes.

"6. To ask our Quaker schools and colleges to refuse to accept military training units or contracts, or military subsidies for scientific research, and to advise Young Friends not to accept military training in other institutions.

"7. To create a home and family atmosphere in which the ways of love and reconciliation are so central that the resort to violence in any relationship is impossible.

"8. To help develop the institutions, methods, and attitudes necessary to a harmonious and peaceful world; to replace political anarchy, national sovereignty and war by law and government; to press for world disarmament beginning unilaterally with the United States, if necessary, instead of the present armaments race; to work for the immediate repeal of draft legislation; and to share willingly and sacrificially our resources for the rebuilding of the world.

"We realize that the basic task in peacemaking is to fill the spiritual void in our civilization by replacing the fear that now cripples all our efforts with a faith in the Eternal Power by which God unites and sustains those who pursue His Will; and we extend our fellowship to all those of other persuasions who share this faith.

"In humility and repentance for past failures, we call upon all Friends to renew the springs and sources of our spiritual power in our meetings for worship; to examine our possessions, to see if there be any seed of war in them; and to live heroically in that life and power that takes away the occasion of all wars and strife."

I have read the entire statement. Now, ladies and gentlemen, I should like to ask you this question: have any of you seen this statement or heard this statement before?

Mr. Openlander: Just a moment. Up until the time that Mr. Ohlinger read this last part, I was under the impression—and I think all of us in the court room were under that same impression—that these were the basic tenets of a sect that was founded some time in the 1700's.

Mr. Ohlinger: Pardon me.

Mr. Openlander: Yes. These quotations or these statements he has now read, having to do with the Selective Service Act, and having to do with the purchase of war bonds, &c., indicate pretty conclusively to me that these are not basic tenets of this religion; they are not the foundation, is it were, upon which the religion is based; but, rather, they are the ideas of some one now in existence as to what should be done by the members of this sect.

Mr. Ohlinger: Let me correct you on that.

The Court: May I ask counsel where is this extracted from?

Mr. Ohlinger: I will be very glad to give you this statement, Your Honor. The Friends are governed, as I understand it, by what they call a meeting; and this was adopted at a National Meeting of the Friends in the United States, held at Earlham College, Richmond, Indiana, on July 20 to 22, 1948. Am I correct about that?

Mr. Heisler: Yes.

Mr. Openlander: The delegates adopted this resolution, is that it?

Mr. Ohlinger: Yes, the delegates from all meetings of the Quaker Sect.

The Court: You began by quoting what you referred to as basic tenets of the Friends' religion.

Mr. Ohlinger: Yes.

The Court: As founded in the Seventeenth Century. Now you are reading some resolution that was recently passed by some congregation, am I correct?

Mr. Ohlinger: Not a congregation, but by the entire society of the United States. The part that I had read, from George Fox, is embodied in their whole resolution.

The Court: Your question is whether they ever heard of that?

Mr. Ohlinger: That is right.

The Court: By their silence they say they have not.

Mr. Ohlinger: You have not heard anything about that. Ladies and gentlemen, do you accede, any of you accede, to this statement I have read?

Mr. Openlander: Objection. I think that question highly improper.

The Court: I think I will sustain the objection to that.

Mr. Ohlinger: May I have an exception to that?

The Court: You may.

* * * * *

Thereupon, the jury was duly sworn, and further proceedings were had, to-wit:

The Court: Ladies and gentlemen of the jury, I think at this point we may take the noon recess. We have but ten minutes to go when the court would normally recess for noon hour, and that is hardly time to allow either of counsel to make their opening statement. Return here promptly at two o'clock.

I want to particularly charge the jury now so that it may be unnecessary for me to repeat what I have to say at each recess of the jury. Keep this in mind throughout the trial: do not talk about the case. Do not talk about it among yourselves. Do not permit any one to talk to you about it, or to talk about it in your presence or hearing. If any one should attempt to talk to you about the case, walk away, and if that is not sufficient politely inform them that you are a juror in the case and that you cannot listen to any discussion. If that is not sufficient, report to the court.

Do not form or express an opinion with reference to this case until it has been finally submitted to you; and by that I mean until all the evidence is in, counsel have argued the case to the jury, the court has charged the jury, and you have retired to your jury room. Then is the time for you to discuss the case, and not until then.

Please keep these cautions in mind throughout the trial.

(Noon recess.)

The Court: Proceed to state the case for the government.

Mr. Openlander: Before proceeding to state the case, I should like to move for an order excluding witnesses.

Mr. Heisler: It is agreeable with us.

Mr. Openlander: I should like, at the same time, to have Mr. Tootell, of the Federal Bureau of Investigation, who investigated the case, remain here with me.

Mr. Ohlinger: Do you expect that he will be a witness?

Mr. Openlander: Yes.

Mr. Ohlinger: I think that ought to include Mr. Tootell, then.

The Court: Ladies and gentlemen, those of you who expect to testify in this case, whether you have been subpoenaed or not, will leave the room and remain outside until summoned by the bailiff. Mr. Tootell may remain.

Mr. Ohlinger: I wish to note an exception to Mr. Tootell's remaining.

The Court: That may be done.

Mr. Openlander: I have no objection to character witnesses remaining, Your Honor.

The Court: Very well. You may proceed.

Mr. Openlander: If the court please and members of the jury, in this case the government prosecutes the defendant, Larry Gara, under an indictment which was returned at the last session of the grand jury. As returned there were two counts in that indictment. The government has voluntarily dismissed one of those counts, so that we are proceeding particularly on the second count of that indictment, and that count reads as follows:

"On or about the 8th day of November, 1948, at Bluffton, in the Northern District of Ohio, Western Division, Larry Gara knowingly counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948."

Now in order that you may understand the situation which is presented in this case, I want to read briefly to you one of the regulations under the Selective Service Act because I believe it will be helpful to you in considering this case.

Mr. Ohlinger: Which regulation is that?

Mr. Openlander: I am just about to read that, and I will tell you.

Mr. Ohlinger: Will you give me the number, please?

Mr. Openlander: Yes. It is 611.6, Subdivision (d). That regulation reads as follows:

"The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be." • • •

That is the regulation. I have read it to you for the purpose of pointing out the fact that this is a continuing duty on the part of any young man to register under the provisions of the law.

The indictment in this case is drawn under the provisions of Title 50, Section 462, of the United States Code; and I am going to read you, not the entire section because this Section 462 is quite lengthy, covering a little more than a page, but I am going to read you the part of that section under which this defendant is charged, omitting, of course, parts of it:

"• • • Any person who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, shall, upon conviction in any court of the United States of competent

jurisdiction, be punished as thereinafter provided * * *."

The evidence in this case which will be offered on behalf of the government will show that there was a young man by the name of Rickert who was a student at Bluffton College, who, under the Selective Service Law, was required to register with one of the draft boards at Lima, Ohio. He presented himself to that draft board on the 10th of September, 1948. At that time, in accordance with the selective service regulations, as you will hear from the witness stand, it was necessary for any young man of the age where he was required to register, to present himself and to give certain information relative to himself in order that he might be properly classified.

The evidence will show in substance that on the 10th of September, Rickert presented himself to the draft board, gave them certain information about himself, but that he refused to give additional information which was required under the provisions of the Act, and that he at that time stated that he did not intend to comply with the provisions of that Act.

The evidence will show that he was thereupon advised by the members of the draft board of the fact that his refusal to register subjected him to certain penalties, but that he stated in substance he was not concerned about that, and that he did not intend to comply with the Act.

We expect the evidence in this case also to show that some years ago, during the war, and while the previous Selective Service Act was in effect, Mr. Rickert registered with another one of the draft boards in Lima, Ohio. At that time I believe he was about eighteen. I think he is in the neighborhood of twenty-two at this time. The evidence will show that at that time when he registered under the first Selective Service Act, Mr. Rickert claimed he was a ministerial student, and that for that reason he should be deferred and not be called into active service. And the evidence will show that he was given that ministerial status by the draft board in Lima at that time.

The evidence will show, as I have indicated, that Mr. Rickert made no claim when he came in to the draft board

on the 10th of September that he was entitled to a ministerial status; although as a practical matter I believe the evidence will show that if he had claimed such ministerial status, he himself had no question but that it would have been granted to him.

Mr. Heisler: I hate to interrupt the opening statement, but I don't believe such showing of what could or would have happened is pertinent to the issues; nor is it pertinent what happened five or six years ago to an indictment in a case under the 1948 Selective Service Act, and a violation thereof. I don't believe that counsel should proceed along those lines of speculation as to what could have happened.

Mr. Openlander: I do not intend to proceed further. It does seem to me it is of importance.

The Court: State only what you expect the evidence to show.

Mr. Openlander: All right. After this man, Rickert, had refused to register, the evidence will show that that refusal was reported to me, as the assistant United States attorney, here at Toledo; and that I thereafter authorized a warrant for his arrest.

The evidence will show that in pursuance of that warrant, on November 8, 1948, Mr. Tootell, one of the agents of the Federal Bureau of Investigation, and one of the deputy sheriffs from the Lima office—that is, the sheriff of Allen County—went over to Bluffton, to Ropp Hall, for the purpose of arresting the defendant Rickert. The evidence will show, I believe, that they called at the Administration Building or at the office of the registrar of the college there, and were told that Mr. Rickert roomed in Ropp Hall; and that they therefore went over to Ropp Hall, where they met Mr. Gara.

They met Mr. Gara as they entered the door. There was some exchange of words at that time—no bitter exchange or anything of that sort—he asked them whether they were United States marshals, and they told him no. Inquiry was finally made of Mr. Tootell as to whether or

not he was connected with the F.B.I. He said he was and they wanted to find out where this boy, Rickert, was.

The evidence will show that Mr. Gara and his wife were there at that time. It will show that when Mr. Tootell or these men indicated that they were there to arrest Mr. Rickert, Mr. Gara said in words or in substance, "Well, if you are down here to arrest Rickert, you ought to arrest me and my wife too, because we told him not to register."

The evidence will show that these men who had gone down there to make the arrest then went up—they found that Mr. Rickert's room was on the second floor—and they went up there, and in the meantime I believe Mr. Gara had gone up another stairway and was there ahead of them.

The evidence will show that they then went into Mr. Rickert's room, where he was placed under arrest; that there was some conversation there between them, and every one did some talking; but that in the course of this conversation Mr. Gara, the defendant, said to Mr. Rickert in words or in substance, "Stand by your principles. Do not let them coerce you into registering."

The evidence will show that later, in an interview with Mr. Tootell and one of the other agents of the Federal Bureau of Investigation, at which time they were taking a written statement from the defendant, he admitted these statements which I have quoted; and that he stated he had, I believe, on other occasions encouraged disobedience—

Mr. Heisler: Objection to that statement of counsel. There is no charge here against the defendant concerning any other act except counseling, aiding and abetting Rickert.

Mr. Openlander: All right; I will withdraw it. The evidence will show that during that conversation Mr. Gara stated that it was his intention to be in violation of the Selective Service Act.

Mr. Heisler: Objection. There is no charge and cannot be a charge of intention in the future. It is an improper statement, and I submit it is presented for the purpose of impressing the jury. It is an improper statement and the court should instruct—

The Court: Overruled. When the evidence is offered, the court will rule upon it. If it is admitted, it will be admitted with a proper charge.

Mr. Openlander: Members of the jury, there will be other evidence offered in this case. Rather than have interruptions from defense counsel, I will not go into detail as to the nature or extent of that evidence. Suffice it to say that it will, in our opinion, have a bearing upon the offense which is charged. Upon this evidence and upon this indictment which I have outlined to you in this opening statement, we shall ask for a verdict of guilty at your hands.

Thank you.

The Court: You may state the case for the defense.

Mr. Heisler: If it please the court, counsel for the government, and ladies and gentlemen of the jury, on the basis of the opening statement made by counsel for the government, one wonders why are we all here. Counsel stated that the evidence will show that the young man, Mr. Rickert, on September 10 informed his draft board that he does not intend to register. Counsel stated to you that the evidence will show that when he, Rickert, was informed by the draft board that if he fails to register he will be exposing himself to dire consequences, he said that is not important to him; he will not register; he does not intend to register.

Now we are going to show, and I take it out of the mouths of government witnesses, that there could not have been any counseling, there could not have been any aiding, there could not have been any abetting, on the part of the defendant. How can one counsel, as we will ask the witnesses, not to register when the person already refuses to register, when the person already stated, "I am not going to change my mind; I am not going to register."?

We are going to show it to you clearly and conclusively that at the time when Mr. Rickert, as we will show you, in writing informs the draft board and government that he is not registering, on September 10 or at any

time, he never has spoken to Mr. Gara; that it would have been a physical impossibility for Mr. Gara to counsel, aid or abet. We are going to show, just as government counsel stated, that whatever conversation took place between Gara and Rickert occurred after Rickert was determined, and so stated orally and in writing, that he is not going to register.

We are going to show, just exactly as the government counsel promised he will show it, that when Rickert was to be arrested because of his prior refusal to register, the government agents came to the college where Rickert was a student. We are going to show that Mr. Gara, the defendant here, was a Dean of Men at that college. We are going to show that he lived in the same hall or dormitory where Rickert lived; and that when the government agents came there, polite people as they are, they seeked out the Dean of Men to talk to him about this young fellow, Rickert.

We are going to show that there was some conversation between the defendant and the government agents in which the defendant admitted that he is a member of the Religious Assembly of Friends; he admitted that he believes in the teachings of Christ; he admitted that he believes not only in those teachings, but he lives up to those teachings; he admitted that he is a good Christian, not only on Sunday, but on every day of the week; he admitted that he does not intend to live otherwise but in accordance with the teachings of Christ.

We are also going to show, exactly as the government promised you will be shown, that when the young man, Rickert, who was one of the students of Mr. Gara, was arrested, and when the young man was confronted with jail and custody by the government officials, Gara, his teacher, and a Christian teacher, wanted to give him consolation, wanted to tell him that in his dire need he can and must rely on his own conscience. Yes, he told him, "Do not let anybody coerce you to violate your conscience." And I understand that is the charge on which Mr. Gara was arrested, and he is standing trial before you and before the court.

We are going to show that there was no counseling, that there was no aiding or abetting, because there was no opportunity to do so because Rickert already made up his mind and did what his conscience dictated him to do.

The defense will go a step farther, because we are not going to stand before you and try to hide behind technicalities—that is not the purpose of the defense—we are going to go one step farther and we are going to say even though this defendant should be found guilty, the charge was never committed, because it could not have been committed; we are going also to show that assuming Gara would have counseled Rickert that he should follow his Christian conscience, Gara could not and should not be found guilty, because there are two higher laws than the law which counsel for the government read. One higher law is the Constitution of the United States. And there is a still higher law, and that is the law of God. Under these two higher laws, Mr. Gara was justified to do what the government charges him to do.

We are going to show that under the Constitution he did not do anything else but carry out a provision pertaining to freedom of speech; that he expressed a deep-felt opinion; and that such expression is protected by the Constitution of the United States, notwithstanding any law or regulation of Selective Service. We are going to show—and I am sure the court so will instruct the jury—that if there is any conflict between the rules and regulations of the Selective Service and the Constitution, the Constitution of the United States prevails.

We are going to attempt to show something more by our evidence, and that is that religious freedom is guaranteed to every man, woman and child in this country by the Constitution; and we are going to show that counsel for the government is wrong, that he is mistaken, when he believes that this protection is extended only to the belief; no, protection is extended even to acts upon that belief; that the Constitution does not mean that one should hide his religious convictions; the Constitution says religious conviction, demonstrated by act, is protected.

We are going to show that this country believes in the command of God; that this country will, under all circumstances, consider the command of God as the highest law of the land. We are going to show that Mr. Gara believed in the commands of God. We are going to show that he lived in accordance with the commands of God; that whatever he did, he did because of his dictate of conscience; and that under no law of this land can the defendant be sent to the penitentiary because he lived in accordance with the dictates of his conscience. And we are going to ask you, when the evidence is before you, that you should find Mr. Gara not guilty.

Mr. Ohlinger: Now may it please Your Honor, before a witness is called I wish to present a matter which will arise again in the course of this trial. I don't know to what extent the court will listen to me at this time, but I am going to make a motion.

The Court: Do you want to make a substantive motion?

Mr. Ohlinger: I am going to make a motion.

The Court: It should be done in the absence of the jury.

Mr. Ohlinger: It must be done in the absence of the jury?

The Court: Certainly. If you are going to argue a motion, I do not want it done in the presence of the jury.

Mr. Ohlinger: All right. I think now is the proper time for me to make a motion.

The Court: Very well. The bailiff will take the jury out.

Thereupon, the jury left the court room, and the following proceedings were had, to-wit:

Mr. Ohlinger: I wish to make a motion for a judgment of acquittal at this time, based upon the opening statement of the District Attorney. My motion is based upon his presentation of the evidence that he intends to introduce:

In the first place, on September 10, 1948, Mr. Rickert presented himself to his draft board and stated to the draft

board that he did not intend to comply with the Act. I think those are the precise words first used. Then Mr. Openlander said he proposed to prove that after the draft board had called attention to the consequences of a refusal, and had warned him, Rickert again said that he refused to register and did not intend to register. That took place on September 10, 1948.

Then Mr. Openlander says that a warrant was issued for this young man, Rickert, and it was served on the 8th of November; and upon the occasion of the service of this warrant, Mr. Gara, according to Mr. Openlander, said, "Stand by your principles. Do not let them coerce you into registering."

That, in substance, is what the District Attorney intends to prove, and those facts do not constitute a crime under this Act or under the Constitution.

First of all, let me call Your Honor's attention to this fact: there could be no act such as Mr. Gara is charged with here under this evidence. The charge in the second count of the indictment is that:

> "On or about the 8th day of November, 1948,"—
> that was two months after all this had happened—
> " * * * Larry Gara knowingly counseled, aided and abetted" &c.

Now, Your Honor, if it was criminal to refuse to register, the crime had been performed.

Now the position, in the second place, of the District Attorney is this, that under this regulation this is a continuing offense. The law does not say that. And I can find no case, Your Honor, where a party has been indicted and convicted on the basis of that regulation as committing a continuing offense. There may be some cases but I have not been able to find them.

Thereupon, arguments were had by counsel for the defendant upon the motion.

The Court: Any argument in opposition?

Mr. Openlander: No, Your Honor.

The Court: The motion will be overruled. The bailiff may summon the jury.

Thereupon, the jury returned to the courtroom and the following proceedings were had, to-wit:

Thereupon, the plaintiff called as a witness,

CELESTE SILER,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Openlander:

Q. State your name, please, to the court and jury? A. Mrs. Celeste Siler.

Q. Where do you live? A. Lima, Ohio.

Q. What is your street address in Lima, please? A. 921 North Main.

Q. Are you connected with one of the draft boards in Lima? A. Yes, I am Clerk of Board No. 2, Allen County.

Q. Can you tell us, please, whether Charles Ray Rickert was registered at your board, or whether he is? A. No, he is not registered.

Mr. Heisler: Objection to this question. I think the matter is not pertinent to the issues, whether or not Rickert was or was not registered at any place. I would like to call the court's attention to the fact—

The Court: Do counsel stipulate that the man was of draft age and subject to the draft?

Mr. Heisler: As a matter of fact we are ready to stipulate that the man was brought before this court and was convicted.

The Court: No, that is not what I asked you.

Mr. Heisler: Yes, we are ready to submit that he was of draft age.

The Court: Proceed to arrange your stipulation.

Mr. Openlander: May it be further stipulated that he has not complied up to this date with the requirements of the Selective Service Act by registering with the board?

Mr. Heisler: We could not stipulate to that because our position is that there was a certain time when he had to register. We are ready to stipulate on the date when he was ordered to register, he refused to register.

Mr. Openlander: I expect I will have to prove it, then.

The Court: Proceed. Objection overruled.

Mr. Ohlinger: We will object to all that evidence as irrelevant, Your Honor. I think Your Honor knows our position on that, and it is not necessary for me to go into it fully.

Q. State whether or not, please, Charles Ray Rickert was a registrant at your board, or whether he ever appeared before your board? A. He never registered with our board.

Q. Did he ever appear there? A. Yes, he did.

Q. Tell us, please, when he appeared? A. He appeared on September 10, 1948.

Q. Did you talk with him on that day? A. Yes, I did.

Q. Did you seek to obtain certain information from him for the purpose of registering him in accordance with the Selective Service Act? A. Yes, I did.

Q. Making such use of this registration card, that has been marked Exhibit No. 1, as you feel is necessary, tell us, please, what information Mr. Rickert gave you on that day, September 10, 1948, when he came in to register? A. Well, he gave us his name, his address, and his date of birth, I mean just the year of his birth.

Q. In what year did he say he was born? A. 1927.

Q. Did he give you any other information? A. No, that is all.

Q. Under the provisions of the Selective Service Act, do you make inquiry for the purpose of properly registering the registrants at your board?

Mr. Ohlinger: Objection to that conclusion. Let the witness say what she did and what was said.

Mr. Openlander: I am not asking what she did about Mr. Rickert; I am asking whether or not as part of her duties she asks registrants certain questions when they present themselves.

The Court: She may answer.

A. Yes, sir.

Q. Did you ask Mr. Rickert those questions? A. Yes, sir.

Q. Did he answer all questions you asked of him? A. No, he did not.

Tell us, please, whether or not, since the 10th of September, Mr. Rickert has ever at any time presented himself to your board for the purpose of registering or supplying this additional information that is required?

Mr. Heisler: Objection.

The Court: Overruled. She may answer.

A. No, he has never returned to our office.

Q. So that your registration on Rickert is incomplete, is that right? A. Yes, sir.

Q. And all the information you have about him is the information that is set forth on this card, Government's Exhibit No. 1, is that right? A. Yes, and his letter he presented.

Q. He presented a letter at that time, did he? A. Yes, sir.

Q. Is this the letter that he presented? A. Yes, sir.

Q. Then there are other papers in this file, are there not, having to do with his case? A. Yes, sir.

Mr. Openlander: You may cross-examine.

CROSS EXAMINATION

By Mr. Ohlinger:

Q. Mrs. Siler, was this the only occasion on which you saw Mr. Rickert? A. Yes, sir.

Q. That, you say, was on the 10th of September, 1948? A. Yes, sir.

Q. Was any member of the board present there at the time? A. Yes, sir.

Q. Who were the members that were present? A. There were two members, Mr. Ortha O. Barr and Mr. James A. Fitzgerald.

Q. You were present with these two gentlemen of the board when Mr. Rickert came in? A. Yes, sir.

Q. You say that was the only time you ever saw him? A. Yes, sir.

Q. When he came in, you say he presented a letter, which the District Attorney showed you, but which has not been identified as an exhibit by him. I will ask the clerk to identify that paper. (Clerk does.) The letter which the District Attorney showed you has now been identified as Defendant's Exhibit A, is that correct? A. Yes, sir.

Q. Is that the letter that Mr. Rickert presented to you? A. Yes, sir.

Q. Was this letter read by the members of the board at that time? A. Yes, it was.

Q. Was it read aloud? A. Yes, sir.

Q. And all three of you were present at the reading? A. Yes, sir.

Q. Did Mr. Rickert say anything in further explanation of the contents of this letter?

Mr. Openlander: Objection as being immaterial.

The Court: She may answer.

Q. Did he say anything else besides handing this letter in? A. Well, no. They talked to him and tried to get him to change his mind.

Q. That is, after he had presented the letter? A. Yes; and explained to him that he would have time in which to present his case after he registered, on those grounds.

Q. Did he say anything? A. He said he realized that, and he still refused to register.

Q. He still refused to register? A. Yes, sir.

Q. Did he ask to withdraw this letter? A. No, he did not.

Q. Did he say anything about this letter to the board?

Mr. Openlander: Object. It has already been answered, Your Honor, and I don't think it is material.

The Court: She may answer.

A. No. I don't think he did.

Q. What I am trying to get at, was all he did hand the letter in without making any oral statement of any

kind? A. Well, he did talk with members of the board. They of course explained to him and just had that conversation, and explained to him the penalties. And he said he still refused to register; his mind was made up to that.

Q. You say he said his mind was made up to that? A. Yes, sir.

Q. He refused to register anyway? A. No mattter what they said, he still refused.

Q. Did this conversation take some period of time or was it a very short session? A. I would say about fifteen minutes.

Q. Then Mr. Rickert left, I take it? A. Yes, sir.

Q. And you never saw him again? A. No, sir.

Q. And this letter, Exhibit A, was left in your file? A. Yes, sir.

Q. Of your board? A. Yes, sir.

Q. I notice here the letter is dated at Bluffton, Ohio, September 10, 1948. That is the very day you are talking about? A. Yes, sir.

Mr. Ohlinger: I ask to read this letter to the jury.

Mr. Openlander: Objection.

The Court: Just a minute. Sustained.

Mr. Heisler: May we have the government's reason for the objection to the letter that was left by Mr. Rickert on the day of registration?

The Court: They are not objecting to the letter, Mr. Heisler; they are objecting to reading the letter.

Mr. Openlander: I do not understand it has been offered.

Mr. Ohlinger: I thought you had offered it.

Mr. Openlander: No. I did not even mark it as an exhibit. I didn't think it was material.

The Clerk: It is marked as a defendant's exhibit.

Mr. Ohlinger: I offer Defendant's Exhibit A in evidence.

Mr. Openlander: I object, if the court please.

The Court: Let me see the exhibit. (Exhibit shown court.) What is the ground of the objection?

Mr. Openlander: I think the letter is entirely immaterial to any issue that is on trial in this case. It is a self-serving statement by the registrant as to the reasons why he did not want to register. It has no connection with any issue involved here. This witness is called for the sole purpose of showing that on the date laid in the indictment, the registrant in the case had not complied with the provisions of the Selective Service Act.

The Court: The objection to the document will be sustained. It is not material. You may have your exceptions.

Mr. Ohlinger: Note our exceptions to that. Of course Your Honor knows our position on this, and I don't think it is necessary for me to elaborate any further here unless the court asks for it.

The Court: Any further questions of this witness?

Mr. Ohlinger: In view of the court's ruling on this letter, I move that the entire testimony of this witness in regard to what took place on the 10th of September be excluded, and the jury be directed to disregard it.

The Court: Overruled.

Mr. Ohlinger: This letter is part of what took place there.

The Court: Overruled.

Mr. Ohlinger: Exception.

REDIRECT EXAMINATION

By Mr. Openlander:

Q. This card that has been marked Government's Exhibit No. 1 is part of your records down there in the draft board, is that right? A. Yes, sir.

Q. After these events you have testified to took place, you then notified the United States Attorney's Office here in Toledo? A. Yes, sir.

Mr. Openlander: That is all I have at this time. I offer Government's Exhibit No. 1.

Mr. Heisler: Objection, if Your Honor please.

The Court: Overruled. It will be admitted.

Mr. Heisler: At this time we make a motion that the whole file of the draft board be admitted. If any part of it is material, then the whole is material, and I think the court should have the whole file before it. For that purpose the defendant offers Defendant's Exhibit A, and the two sheets which were also identified by this witness as part of the draft board file of Mr. Rickert.

The Court: Overruled.

Mr. Heisler: Exceptions, Your Honor. Just for the record I should like to have this marked as a rejected exhibit. We do not want the clerk to take it away.

Mr. Openlander: If you want to mark them—

The Court: You have had it identified.

Mr. Heisler: Yes; I should like to have the clerk identify here the first sheet, dated September 10, 1948, as Defendant's Exhibit B, and the next one, which is dated October 19, identified as Defendant's Exhibit C; and I would like to have the record show that all three, A, B and C, were offered and rejected.

Mr. Ohlinger: Those exhibits, Your Honor, are separately offered.

The Court: Without objection, B and C will be admitted.

Mr. Openlander: May I see them, if Your Honor please? (Documents shown.) Object to Exhibit B.

The Court: Upon what grounds?

Mr. Openlander: On the grounds it is immaterial, the same as was the Exhibit A; on the further ground that it is—

The Court: It is an order of the board?

Mr. Openlander: No, Your Honor, this is a confidential report, to me, which was attached originally to the letter which is Exhibit C.

Regarding Exhibit C, I don't believe it is of any materiality here. It is a formal report to me of the fact that this man had refused to comply with the provisions of the Selective Service Act.

The Court: Let me see them again. (Documents again

shown court.) What indication is there on Exhibit B that it was a report to you from the board?

Mr. Openlander: Your Honor, that as a matter of fact is what it is. It was attached to the letter which is Exhibit C. You can see where the paper clips were there and they have been removed. That was for the purpose of advising me of what happened.

The Court: You say that C was clipped to B?

Mr. Openlander: Yes, Your Honor.

The Court: The objection will be sustained. B and C will not be admitted.

Thereupon, the plaintiff called as a witness,

WILLIAM E. TOOTELL,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Openlander:

Q. Will you state your name, please? A. William E. Tootell.

Q. Where do you live? A. I live in Lima, Ohio.

Q. Where, in Lima? A. 721 West Market Street.

Q. What is your position or occupation? A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And did you in your capacity as Special Agent

of the Federal Bureau of Investigation have anything to do with the arrest of a boy named Rickert, on November 8, 1948? A. I did.

Q. Where did that arrest take place? A. At Ropp Hall, at Bluffton College, in Bluffton, Ohio.

Q. Did you go to Ropp Hall for the purpose of placing this boy, Rickert, under arrest? A. I did.

Q. Who was with you? A. Deputy Sheriff Loren D. Fairall, of Allen County.

Q. Did you see the defendant, Larry Gara, on that day? A. I did.

Q. Did you see him on the campus there? A. I did not.

Q. In one of the buildings? A. In Ropp Hall.

Q. Tell us in your own words what happened when you saw him there in Ropp Hall? A. Deputy Sheriff Fairall and myself had just entered the main entrance to the dormitory. We were greeted just inside the door by Mr. Gara, who asked us if we were United States marshals. I told him no. Deputy Sheriff Fairall and myself walked over to a bulletin board which they had there with a schedule of room assignments on it. I looked up there and found that Charles Ray Rickert was assigned to Room No. 14. However it did not say what floor that room was on; and I asked Mr. Gara where the Room No. 14 was located. He said it was upstairs. With that he said, "You must be from the F.B.I., then?" I said, "Yes, that is right." He said, "Well, you cannot take Rickert unless you take my wife and me"—

Mr. Ohlinger: Objection to that last statement, Your Honor, and ask that it be stricken and withdrawn from the jury.

The Court: Overruled.

Q. Proceed? A. —"We are just as guilty as he, for we told him not to register."

Mr. Ohlinger: I don't think any of this relevant or material, and ask that it be stricken, and that the District Attorney be cautioned not to proceed in this manner.

The Court: Overruled.

Mr. Openlander: Because of these interruptions—

Mr. Ohlinger: Objection to that kind of comment when I am making a proper objection.

The Court: The objection has been overruled. Proceed.

Q. Your answer was split, was it? A. It was.

Q. Can you give us the statement that he made to you then? Would you repeat it in order? And I assume there will be no further objection or interruption. What was it? A. The exact words were, as I recall, "If you take Rickert you must take my wife and me. We are just guilty as he because we told him not to register."

Q. That statement was made by Mr. Gara there in Ropp Hall on the 8th of November, when you were down there to arrest Rickert? A. That is true.

Q. Then what happened after that? A. Deputy Sheriff Fairall and myself went up a flight of stairs, which was almost opposite the main entrance. On arriving at the upper floor we observed Mr. Gara ushering Mr. Rickert from an adjoining room into his own room. Mr. Gara proceeded into the room behind Mr. Rickert, and Deputy Sheriff Fairall and myself were right behind them. On entering the room Mr. Gara placed his right hand on Mr. Rickert's left shoulder, and said, "Stand by your principles. Do not let them coerce you into registering." Mr. Gara stated at that time that he was going with us. I told him he was interfering with a lawful arrest; that we had a warrant for this boy, Rickert; and that he ought to desist and allow us to proceed. We took Mr. Rickert out of the hall. He came very willingly. We went to Lima, Ohio, where he was interviewed in the sheriff's office, in the Allen County court house.

Q. That is, Rickert was interviewed? A. That is true.

Q. Did you see the defendant, Gara, after, that day? A. I did not, sir.

Q. When did you next see him? A. On November 15, 1948.

Q. Where did you see him? A. On the campus at Bluffton College.

Q. Who was with you that time? A. Special Agent William W. Stickle of the Federal Bureau of Investigation.

Q. How did you happen to be there at Bluffton College? How did you happen to see Mr. Gara on that day? A. We were ordered to go there to interview Mr. Gara regarding previous letters which he had written and statements which he had made.

Q. Did you interview him? A. We did.

Q. Where did the interview take place? A. In his own living quarters in Ropp Hall.

Q. Tell the jury what happened that day when you went down to the College to interview Mr. Gara?

Mr. Heisler: Object on behalf of the defendant because any transaction, conversation, that occurred the 15th day of November, and when the charge is that Mr. Gara did a certain act on the 8th day of November, would not be material and would not prove the issues.

The Court: Overruled. The court will admit such statements if for no other reason than going to the question of the intent of the defendant.

Mr. Heisler: If Your Honor please, I make a further objection and exception to the court's statement, because I don't believe under any law intent November 8 could be shown by any statement November 15. It could be recitation but it could not be intent, seven days later.

The Court: You may have your objection.

Q. I believe my question was, tell us what happened on the day you took this statement? A. Special Agent Stickle and myself arrived at the Administration Building at Bluffton College, in Bluffton, Ohio, at about 3:30 in the afternoon. We went to the Registrar's Office to ascertain whether Mr. Gara was in class or not. We were advised he had a class on and would not finish until approximately 4:00 o'clock. We waited until he completed his class. He met us just outside the Administration Building. We walked together, the three of us, over to Ropp Hall. Upon arriving at his domicile there, we passed the usual pleasantries for a minute, and about that time Mrs. Gara ap-

peared. She joined us there, and we began the interview. During the course of the interview I asked Mr. Gara regarding the statement, which I quoted a few minutes ago, that he had made when we first entered the dormitory, when Mr. Rickert was there.

Q. Which statement are you talking about? A. The first one, in which he said to us that we could not take Rickert without taking his wife and him, because they were as guilty as Rickert in that they had told him not to register. He stated in regard to that that he might have said that, but that it was not true; in fact he had not known Mr. Rickert prior to his refusal to register on September 10, 1948.

We proceeded with the interview. In fact at that point he stated he wished he had known Rickert before, in that he would have liked to encourage him in his stand. Mr. Gara also advised that after he learned of Mr. Rickert's stand in the matter, and his refusal to register, he had encouraged him and supported him in that stand.

After we talked for some time, I wrote up a two-page statement, which I have with me—

Q. Go ahead? A. —containing statements which he had made during the interview. At that time, as the statement will show, he stated—

Mr. Heisler: Objection.

Q. Do not testify what is in that statement. Had Mr. Gara been advised that you were going to reduce his statements to writing? A. He had. At the beginning of the interview he was advised by Mr. Stickle, Special Agent, that we were there for the primary purpose of interviewing him regarding these statements and actions which he had made. Mr. Stickle advised him that he did not have to make any statement unless he wanted to; any statement he was going to make would be entirely voluntary on his part; no threats or promises of any kind to be made to him; he had the right to be represented by an attorney; and that anything he said could be used against him in a court of law.

Q. And did he make any statement at that time or any comment as to whether or not be wanted any one there

or anything of the sort? A. No. He stated he was more than willing to talk to us and explain the situation as it existed.

Q. After the statements made by Mr. Gara had been reduced to writing here—these papers that Mr. Ohlinger is now examining—was he asked to sign the statement? A. He was.

Q. Was he given an opportunity to read it over? A. He was.

Q. I notice on the first page of that statement—the first page has now been marked Government's Exhibit 2-A—down along towards the bottom of it there is a correction, and that the words "appeared to be" have been put in there. In whose handwriting is that? A. Mr. Gara's.

Q. He wrote that on there himself? A. He did.

Q. The rest of the writing on Sheets 1 and 2, which are now Government's Exhibits Nos. 2-A and 2-B, was written by you, is that right? A. That is correct.

Q. Did Mr. Gara at that time or any subsequent time give you any other papers or pamphlets? A. He did.

Q. I direct your attention to Government's Exhibit 3, and ask you whether you recognize that? A. I do.

Q. What is it? A. It is "A Call to American Christions of Draft Age" issued by the Peacemakers.

Q. Did you ever see it before? A. I saw one like it before.

Q. Where did you get it? A. From Mr. Gara.

Q. What did you do with it? A. Turned it over to you at your specific request.

Q. Do you recognize this Government's Exhibit No. 3 as being the one that you turned over to me? A. I can't say positively that it was the same one, but it was one exactly like it.

Q. I believe you testified, Mr. Tootell, that after you had written this statement, Government's Exhibits 2-A and 2-B, you then gave it to Mr. Gara to read? A. That is true.

Q. And did you give it to him or did you read it? A. We gave it to him.

Q. And he read it? A. That is correct.

Q. Did you make any inquiry at that time as to whether or not the statement was correct? A. I did.

Q. What did he say about it? A. He made the corrections on there first.

Mr. Ohlinger: To that we object, Your Honor. That implies the materiality of this statement, to which we shall object.

Mr. Openlander: I do not intend any such implication at all. I am just trying to lay the foundation.

Mr. Ohlinger: We do not wish to waive our objection to the statement, if it is offered.

Mr. Openlander: I understand that; certainly.

Question read.

Q. What did Mr. Gara say as to the truth or the accuracy of the statement in its present form?

Mr. Ohlinger: The same objection.

The Court: You may have your objection. It may be a continuing one.

Mr. Ohlinger: We do not wish to be understood as waiving any objection we have to the statement or any part of it.

The Court: Very well.

A. After the corrections had been made in accordance with his request, I asked him if the contents were true, and he said they were.

Q. Did you ask him to sign the statement? A. I did.

Q. What did he say to that? A. He said he did not care to sign it at that time; he wanted to think it over. He said he might sign it the next day, if we came back; but I told him that was his opportunity; if he cared to sign it, we would be glad to have him; if he did not want to, that was his privilege.

Mr. Openlander: At this time I should like to offer in evidence the statement, which has been marked Government Exhibit 2-A and 2-B.

Mr. Ohlinger: To that we object; and I want to make a specific objection—

The Court: You may do so.

Mr. Ohlinger: —to different parts of it.

Mr. Openlander: I have advised Mr. Ohlinger during recess of the fact that I intended to offer this statement. I also advised him of the fact that I have certain other exhibits which I expect to offer. And I appreciated the fact at that time that Mr. Ohlinger intended to make an objection. I believe without question that there are some points of law to be argued, or upon which Mr. Ohlinger wants to argue, and I would accede to the suggestion that there are points involved that perhaps should be argued. It is a question of whether or not Your Honor at this time desires to have those arguments in the presence of the jury or in their absence.

The Court: What is your purpose in offering the document at this time?

Mr. Openlander: I am at the point now where I should like to proceed further to interrogate the witness with regard to certain statements contained in this statement.

The Court: I think I will send the jury home, then.

Thereupon, the jury was excused, left the court room, and the following proceedings were had, to-wit:

The Court: You may proceed, gentlemen.

Mr. Openlander: If the court please, the government has prior to the time the jury was excused formally offered in evidence Government Exhibit 2-A and 2-B. I might also call the court's attention to the fact that there are three other letters which were written by the defendant, Gara: one, dated September 30, 1948, addressed to Attorney General Thomas Clark, Department of Justice, Washington, D. C.; one, dated November 8, 1948, addressed to the Federal District Attorney, here at Toledo; and the third, dated November 12, addressed to the United States District Attorney, at Chicago, Illinois. Defense counsel have stipulated that these letters were written by the defendant. They reserve, however, their objections to their materiality or admissibility here in this case. I at this time should

like to offer, separately, Government's Exhibits Nos. 4, 5 and 6.

It is my understanding, of course, that defense counsel, in addition to objecting to Government Exhibit 2-A and 2-B, also objects to Government's Exhibit No. 3, which is the pamphlet; and I don't know whether the point of law which is involved is the same; but I might as well at this time also offer Government's Exhibit No. 3. I don't know whether the defense has any objection to that, or not, Your Honor.

I am offering these Government Exhibits 2-A, 2-B, 4, 5 and 6, for the sole purpose of showing the intent of the defendant, Gara, at the time that he made the statement to Rickert which has been testified to from the witness stand, the statement being in substance, "Stand by your principles. Do not let them coerce you into registering."

The Court: Is counsel of the opinion that subsequent statements or admissions made by the defendant prior to arrest are limited only to the question of intent?

Mr. Openlander: No, Your Honor, I do not have that feeling; but I do have this very definite thought in mind: I have reason to believe that this case will be reviewed by the higher courts in the event of the defendant's conviction. With the thought in mind of having just as little possibility of error, or just as few points upon which to argue, I am satisfied, so far as Exhibits 4, 5 and 6 are concerned, to offer them for that limited purpose.

Mr. Ohlinger: The limited purpose of intent?

Mr. Openlander: Showing the intent of the defendant.

The Court: How about 2-A and 2-B?

Mr. Openlander: 2-A and 2-B are not in that same category. They are statements made by the defendant prior to his arrest; and I don't believe there is any theory of law by which they could be successfully objected to in a higher court.

Thereupon, arguments were had to the court by counsel on behalf of the respective parties upon the objections of the defendant.

The Court: Gentlemen, late yesterday afternoon, in

the absence of the jury, counsel began an argument to the court ostensibly on the question of whether or not certain exhibits, Nos. 2-A, 2-B, 3, 4, 5 and 6, were to be admitted when offered, and under what conditions, if any, they were to be admitted, and under what limitations, by direction of the court. That argument was presented by the District Attorney.

Counsel for the defense in his argument somehow got away from the question that was being presented to the court, and got on to the question of the Amendment to the Constitution which provides for religious freedom of belief, and argued that because the Constitution provided for religious freedom, freedom of conscience, therefore a man would have the right to select some particular of the United States which his conscience said to him was a bad law, and proceed with impunity to violate that law; and that he was to be free from prosecution if he so violated the law.

That was a very fine philosophical argument, which was instructive to the court, but no law was cited in support of that theory. After all, this court, under his oath and bounden duty, must follow the law. No citations were given to support such a theory.

Thereupon, the District Attorney, in his fervor, commendable as it may be, joined in that argument, and further enlightened the court on certain parallel situations which would obtain if the court established such a principle in the jurisprudence of the country.

The court noted that learned counsel for the defense did not join in that argument, nor did he cite any law in support of that principle that was being advocated by co-counsel. Perhaps his wisdom, age and grace, which come with experience, maturity and practice, cautioned him to be discreet about going on record in behalf of any such advocated principle.

But invariably in these arguments that were had yesterday the court has said to counsel: "What law do you offer the court? What authority do you offer the court for the theories that you are propounding?" After all, that is a natural question for a court to ask. That is what he

is interested in. The court is bound by precedent that would oblige him to determine a question in a certain manner. If he eschews all precedent he is very quickly righted by a reviewing court. If he should attempt to establish such a principle as counsel for the defense has advocated, there is a reviewing court, the Circuit Court of Appeals for the Sixth Circuit, down at Cincinnati, that would quickly point its finger to certain accepted decisions, and say, "Here is the law." I have asked in vain for authorities to support the contentions that have been made.

I have attempted over the evening to find something that might be in point to answer the question that Mr. Heisler has advocated. And I found it. It is not the Sixth Circuit. It is the Fourth Circuit Court of Appeals: Baxley versus United States, 134 Federal 2nd 937, a decision rendered on April 2nd, 1943, affirming the trial court, District Judge Waring; and the opinion is written by Circuit Judge Dobie, and concurred in by Judges Parker and Soper. I am not acquainted with either Judge Soper or Judge Dobie; but I am very closely acquainted with Judge Parker, have worked with him and I have the utmost respect for his legal ability. The opinion is so enlightening on the question that counsel has sought to propound to the court that I want to read some from it. Paragraph 1 of the syllabus:

"The First Amendment guaranty of freedom of religion, of speech and of the press must be liberally interpreted, but rights of an individual are neither absolute nor limitless."

I think counsel, if they have read the Schenck case by the United States Supreme Court, an opinion by Justice Holmes, they will find that same word, "limitless," used in that opinion.

Paragraph 2:

"One may be punished for his religious views when through external conduct such views are put into practice which is fraught with clear and present danger to the safety, morals, health or general welfare of community, and is violative of laws enacted for their protection.

"3. One is criminally responsible who does an act prohibited by valid criminal statute, though he may do it under sincere belief that doing of the act was not only his right but also his duty.

"4. The constitutional guaranty of 'religious freedom' was no defense to member of Jehovah's Witnesses charged with advising evasion of Selective Service Act, notwithstanding he might have been engaged in preaching cardinal tenets of his religion, or even fulfilling mission imposed upon him by God as he saw it.

"6. In prosecution against member of Jehovah's Witnesses for advising evasion of Selective Service Act, testimony of defendant's statements that he was opposed to war, that he would not salute the flag, that he had advised his own son not to fight or wear the uniform, that Germany was sure to win the war and that he would rather live under Hitlerism than the United States was properly admitted as giving complete picture of defendant's statements and as showing that defendant's advice was not based solely on religious tenets."

Let us turn to the portion under paragraph 1 of the syllabus:

"(1) The Constitutional Guarantee of Religious Freedom.

"The First Amendment to the Constitution of the United States provides in part: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.'

"Here, indeed, is a broad and fine guarantee which has been, and doubtless should be, liberally and generously interpreted by the courts. Yet it is equally clear that the rights of an individual under this Amendment are neither absolute nor limitless. Said Mr. Justice Holmes in Schenck vs. United States, 249 U. S. 47: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic.' In Barnette vs. West Virginia State Board of Education, D. C., 47 F. Supp. 251, 253, Circuit Judge Parker said:

"'This does not mean, of course, that what a man may do or refrain from doing in the name of religious liberty is without limitations. He must render to Caesar the things that are Caesar's as well as to God the things that are God's. He may not refuse to bear arms or pay taxes because of religious scruples, nor may he engage in polygamy or any other practice directly hurtful to the safety, morals, health or general welfare of the community."

Turning now to the portion of their opinion on paragraphs 2 and 3 of the syllabus:

"It is also well settled that though one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection. Even clearer is it that one is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty."—citing Reynolds vs. United States, 98 U. S. 145; United States vs. Macintosh, 283 U. S. 605; and other decisions.

Paragraph 4:

"So the principle set forth in these cases negatives freedom of religion as a defense for Baxley to the crime with which he is charged. He may have been, as he claims, engaged in teaching and preaching the cardinal tenets of his religion, even in fulfilling, as he saw it, the mission imposed upon him by God."—That is not the situation here. This defendant is not in that position. This court had a situation before it of a preacher of religion, a minister of the gospel. This man is a teacher of history in a college. Proceeding:

"But, if, as and when, by that same token, he counselled and advised others to evade service or registrations

in the armed forces of the United States, he thereby violated the Selective Service Act, and the First Amendment affords him no protection. This seems to be one of those situations in which an attempt to employ religion as a sword prevents its use even as a shield. In City of Manchester vs. Leiby, 1 Cir., 117 F. 2d 661, 666, Circuit Judge Magruder said:

" 'The civil authority can never concede the extreme claim that police regulations of general application not directed against any sect or creed—however widely the regulations may be accepted as being reasonable and proper—are constitutionally inapplicable to persons who sincerely believe the observance of them to be "an insult to Almighty God".' "

And paragraph 6:

"Finally, Baxley complains that he was prejudiced by evidence, which should not have been admitted, of his statements that he was opposed to war and all killing of human beings, that he would not salute the flag, that he had advised his own son not to fight or wear the uniform, that Germany was sure to win the war, that he would rather live under Hitlerism than the United States.

"It is highly probable that the evidence of such statements by Baxley did place him in an unfavorable light before the jury. We think, however, that such evidence was proper and admissible, when the District Judge carefully cautioned the jury in connection with the effect and bearing of these statements. If Baxley made these remarks, they gave a complete, rather than a partial, picture of what he actually said. There were practical difficulties involved in any endeavor to exclude, and to exclude only, evidence of these and similar statements made by him. This evidence was also germane as tending to show that such attempts as Baxley may have made to advise the evasion of the Selective Service Act were not based solely on the religious tenets that he so deeply believed and so vigorously advocated."

I don't know whether counsel—I see them taking notes—have recently read what Justice Holmes said in the

Schenck case, 249 U. S. 47. But this is the Supreme Court speaking. It is speaking about the same Amendment to the Constitution:

"But the character of every act depends upon the circumstances in which it is done. Aikens vs. Wisconsin, 195 U. S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers vs. Bucks Stove & Range Co., 221 U. S. 418, 439."—There the right of free speech was contended, in the Gompers case—"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced."

So getting back to the problem that we set out to inquire into late yesterday afternoon, there is ample authority—I think I have a dozen books here—that bears upon the question of admissibility of letters and pamphlets, of spoken words, of speeches that were made at other times and places than the one under question, that were held by the courts to be properly admitted, under direction of the trial court to the jury that they were to be considered by the jury as going only to the question of intent of the defendant; as to whether he knowingly or wilfully did the things that he is charged with having done and the things that he is charged with having said. The court assumes counsel for the defense have studied those cases, and that there should be no argument upon that question.

Exhibit 2-A and 2-B is the paper writing made by Agent Tootell and his partner in the presence of the defendant, upon the occasion of their second visit to Ropp Hall, which paper writing, the record so far indicates, was approved and to some extent amended by the defendant himself. The fore part of that paper writing, referring to the defendant's conduct in advising and counseling Rickert to "Stand by your principles; not let them coerce you," and that he would do the same thing again, or words to that effect, is properly admissible in the view of the court as being an admission of the defendant. The second part of that document refers to a speech that the defendant made in Pennsylvania. It seems to the court that he ought especially to charge the jury in connection with that admission, even though it is an admission of the defendant, that the jury should consider it not as a separate offense from the one under investigation, but as going only to the question of intent.

Exhibit 3 is a pamphlet amply covered by one of the cases that I cannot now put my finger on, but a United States Circuit Court of Appeals decision which admits pamphlets that were approved by the defendant, under proper charge to the jury, as going to the question of intent.

The pamphlet, Exhibit 3, when offered, would be admitted by the court, under proper identification and with a proper charge to the jury; as would also Exhibits 4, 5 and 6, being the letters.

Mr. Openlander: In order that the record may be absolutely clear, I am certain counsel are in agreement on this point, but if I did not so state before, the record should show, with regard to those three letters, Exhibits 4, 5 and 6, the defense has waived any objection to the formality of proof with regard to them? It is admitted Mr. Gara wrote them?

Mr. Ohlinger: Oh yes, we need have no further discussion about that.

Your Honor, may I make a brief statement?

The Court: Yes, if it is brief, Mr. Ohlinger. I think we have spent a lot of time.

Mr. Ohlinger: Your Honor criticized me for not making a statement yesterday. I was trying to carry out the purpose of this court not to have more argument than necessary. If I failed in—

The Court: If you have a citation of law which you think would be of benefit to the court, I will be glad to receive it.

Mr. Ohlinger: May I say this, these cases that Your Honor has referred to all emphasize clear and present danger. They are war cases.

The Court: They do not just emphasize that, Mr. Ohlinger; they emphasize the general welfare and safety of the country.

Mr. Ohlinger: They were, however, war cases; in one case where a man was in favor of having Hitler come and take over the country. That was something pretty violent.

The Court: The general welfare is under scrutiny in peace times as well as war times. The safety of the country and of our people is under scrutiny at all times.

Thereupon, the jury returned to the court room, and the following proceedings were had, to-wit:

The Court: Proceed.

Mr. Openlander: If the court please, I should like at this time to offer Government Exhibit 2-A and 2-B, being a statement taken by the witness on the stand, Mr. Tootell, from Mr. Gara, on November 15, 1948.

The Court: The record indicates, does it, that these have been properly identified?

Mr. Openlander: Yes, Your Honor. The testimony of this witness is that they were transcribed or written at the time of the interview; that they were given to Mr. Gara; that he had an opportunity of reading them; that he made one correction in the statement on Government Exhibit 2-A, being the first page of the complete statement; and that he stated that the statements contained in this statement were true. That I believe is a brief summary of the testimony.

The Court: 2-A and 2-B will be admitted. You may read the documents.

Mr. Ohlinger: Your Honor, may I call attention that in the argument Your Honor said part of it was for a limited purpose?

The Court: I only glanced at that one, and that was yesterday. When you arrive at that point, I wish you would notify me.

Mr. Openlander: In order that the record may be absolutely clear, I am certain counsel are in agreement on this point; but if I did not so state before, the record should show, with regard to these three letters, Exhibits 4, 5 and 6, the defense has waived any objection to the formality of proof with regard to them; it is admitted Mr. Gara wrote them.

Mr. Ohlinger: Oh, yes, we need have no further discussion about that.

Mr. Openlander: This is the statement:

"Bluffton, Ohio, November 15, 1948

"I, Larry Gara of Ropp Hall, Bluffton, Ohio, voluntarily make this statement to William W. Stickle and William E. Tootell, whom I know to be Special Agents of the Federal Bureau of Investigation, having been told by them that I do not have to make any statement and that anything I say may be used against me in a court of law. I have also been advised of my right to be represented by a lawyer. No threats or promises of any kind have been made to induce me to make this statement:—

"I was born on May 16, 1922, at San Antonio, Texas,"

—There then follows, and I am about to read, a statement of the other meeting.

The Court: Ladies and gentlemen of the jury, the succeeding portion of the document that the District Attorney is about to read to you contains some reference to a prior speech or prior statements that the defendant is said to have made in Pennsylvania, some weeks before this time in question. It is a principle of law that one cannot be charged and confronted with evidence of crime or statements or acts other than the one charged in the indictment

against him as separate acts of offense; in other words you cannot convict a person of the crime charged by showing that he committed other offenses, perhaps of a similar nature, at some other and different times.

But there is at least one important deviation or exception to that general rule, and that exception holds forth when the acts or spoken words that are sought to be shown, other than those charged in the indictment, are offered for the purpose, only, of showing the intent of the defendant when he made the statements or performed the acts charged in the indictment which is under consideration. In other words, other or similar statements in this case, as are about to be read to you, may be considered by you only as going to the question of the intent of the defendant, when it is alleged he uttered certain words in violation of the Selective Service Act, and you are to consider them only from that viewpoint.

The Act itself reads any person who "knowingly counsels, aids or abets." "Knowingly" and the usual words that are attached thereto, "wilfully," &c., convey with them the thought that when a man knowingly does a thing, he intentionally does it; he does it not in a facetious or idle manner, but does it with intent to do or say the thing that he is charged with having done and said.

In order to give you an index into the mind of the defendant, when it is alleged he uttered certain words in violation of the Selective Service Act, proof of prior similar words may be received by you and accepted by you as interpretive only in so far as they may be interpretive in our mind of the intent of the defendant when he uttered the words charged in the indictment.

You may proceed.

Mr. Openlander: "At 8 P.M. on or about August 25, 1948, I made a speech at the special meeting on Civil Disobedience held at the Friend's Meeting House located on North Sixth Street between Walnut and Washington Streets in Reading, Pennsylvania. This was an open meeting with people of all ages present. There appeared to be men present of legal draft age—ages 18 to 25, but I do not

know the names and addresses of any of them.

"I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. In making this speech I intended to violate the Selective Service Act."—As the court indicated to you, the government is offering that portion of the statement only for the purpose of showing intent.

The rest of it or the next paragraph deals with his activities with Rickert:

"On November 8, 1948, I told Charles Ray Rickert of Ropp Hall, Bluffton, Ohio, 'Stand by your principles, don't let them coerce you into registering.' I made the above statement in the presence of Special Agent Tootell and a Deputy Sheriff of Allen County. At the time I made the above statement I knew Rickert was of draft age and that he had already refused to register for Selective Service on September 10, 1948."

And now I will state that the following paragraph of this statement, like the other paragraph, is offered by the government only for the purpose of showing intent:

"Following the passage of the Selective Service Act of 1948 I signed an open letter entitled, 'A Call to American Christians of Draft Age' published by the Peacemakers of 2013 Fifth Ave., New York 35, N. Y. This open letter advocates refusal to register for the draft."

The Court: Ladies and gentlemen of the jury, that latter reference to a pamphlet may be considered by you only as going to the question of intent of the defendant in connection with the charge against him, as affording you an opportunity for an index into the mind of the defendant. You will consider it only from that view.

Mr. Openlander: I believe that I had offered Government Exhibits Nos. 4, 5 and 6, and that they are covered by the court's rule that they are admitted for the limited purpose of showing intent, as was the case with portions of the statement.

The Court: Are you going to read those?

Mr. Openlander: I was going to read each of these letters.

The Court: Ladies and gentlemen of the jury, the exhibits about to be read to you, 4, 5 and 6, which are now admitted into evidence, are to be considered by you, as heretofore charged by the court, as going only to the question of intent, and you will consider them only from that viewpoint. Proceed.

Mr. Openlander: Let the record show that Government's Exhibit No. 7 is a copy of Government's Exhibit No. 4; that Government's Exhibit No. 8 is a copy of Government's Exhibit No. 5; and that Government's Exhibit No. 9 is a copy of Government's Exhibit No. 6; Government's Exhibits Nos. 4, 5 and 6 being the originals, and Government's Exhibits Nos. 7, 8 and 9 being the copies; and that by stipulation the copies may be submitted in evidence, that is, copies of Nos. 7, 8 and 9 may be substituted for the original exhibits 4, 5 and 6. Is that satisfactory?

Mr. Ohlinger: Then I take it 4, 5 and 6 are withdrawn?

Mr. Openlander: 4, 5 and 6 will then be withdrawn.

The Court: All right.

Mr. Openlander: I am now going to read, subject to the instruction which the court has given the jury, Exhibits 7, 8 and 9, offered, as the court has indicated to you, for the sole purpose of showing intent.

Exhibit 7 is a copy of a letter written by the defendant, Larry Gara. At the top it says, "Copy":

"Ropp Hall Bluffton College Bluffton, Ohio September 30, 1948.

"Attorney General Thomas Clark Department of Justice Washington, D. C. Dear Sir:,

"I was recently shocked to learn that a young man, Ralph E. Cook, a conscientious objector to war and conscription was sentenced to two years in prison for refusing to register for the draft law.

"My wife and I have been publicly and openly advo-

cating that Christians should disobey the draft law and will encourage any young man that we know is taking this position. We believe it is the Christian thing to do and have made known in many instances that those are our feelings. If the law is to be strictly enforced then we, too, should be prosecuted as well as the three hundred ministers who also advocate this position of disobeying the draft law in obedience to a higher moral law. Why should the Department of Justice discriminate and choose to punish only a few of the younger objectors when many of us older people are also violating the law by openly advocating such action? If it is the aim of your department to merely break the spirits of such young men then our country has stooped to the degenerate practices of other totalitarian states by attempting to force men by severe punishment to abdicate their Christian principles for obedience to the nation state. Such practices differ only in degree from those used in Germany, Russia and other totalitarian countries, and are an indication that democracy is no longer a guiding principle with our governmental leaders. I trust that this is not the case and that Cook and other brave idealists like him will be given their freedom instead of a branding of criminal action. These men do not choose to go to prison but the government chooses to put them there. It cannot be too strongly emphasized that the imprisonment of such young Christian idealists will never prove to the peoples of the world that we are a freedom loving country. Sincerely, Larry Gara."

The next, Government's Exhibit No. 8:

"Ropp Hall Bluffton, Ohio November 8, 1948

"The Federal District Attorney Federal Court Building Toledo, Ohio Dear Sir:

"We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to do so. We have openly urged

young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.

"This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government, seems to us a terrible break with our American heritage of freedom. If one believes that war and conscription for war are crimes against humanity then he has a moral obligation to reject these practices and obey the moral law as he sees it. If the course that Charles and others like him have chosen is a criminal one, then we should also be prosecuted for committing a breach of law. However, we do not believe that this is a criminal act and feel that the government should reject the idea of punishment in these cases. If our government continues to punish men of conscience then we shall do everything in our power to identify ourselves with these men and tell every American citizen of the persecution for righteousness' sake that is taking place in our land. Sincerely yours, Larry Gara."

And then underneath, typed, "Larry Gara Instructor in History, Bluffton College." Signed underneath: "Lenna Mae Gara (Mrs. Larry Gara)."

Government's Exhibit No. 9, which is likewise offered for the sole purpose of showing intent, is another letter written by Mr. Gara:

"Ropp Hall Bluffton College Bluffton, Ohio November 12, 1948

"United States District Attorney The Federal Court Building Chicago, Illinois. Dear Sir:

"I have just learned of the arrest of Claire Street, a student at the University of Chicago who, as a conscientious objector to war and conscription has refused to register for the draft. I have known Claire for years and had the privilege of rooming with him when he was a student at William Penn College, Oskaloosa, Iowa. I feel that it would be a crime for our country to imprison a young idealist like Claire.

"This problem especially concerns me since my wife and I would both refuse to register for the draft if we were asked to do so. I have publicly advocated this position and shall continue doing all in my power to further the cause of civil disobedience in this country. We believe that the draft is unChristian and should be disobeyed by those who take their Christianity seriously. If Claire is guilty of violating the law, then I, too, am guilty for I have advocated disobedience to the law and have supported men who take this position."

I am not going to bother reading the concluding paragraph of this letter because it is practically identical to the one he wrote my office in Toledo.

These exhibits will be with you in the jury room and you may read them for yourselves if you so desire, at that time.

With regard to Exhibit 3, Your Honor,—this statement, if the court please, Exhibit 2-A and 2-B, contains a statement in which the defendant stated in the final paragraph there that he had signed an open letter entitled, "A Call to American Christians of Draft Age." I believe in view of that I will offer only that portion of Exhibit 3 which is the back, on the last sheet of the exhibit, which is to be torn off and sent in; and I would like permission to read that to the jury at this time, with the understanding that the government offers it, as in the case of the letters, for the sole purpose of showing intent.

Mr. Ohlinger: Do I understand that the balance of that exhibit is now withdrawn?

Mr. Openlander: I do not offer it.

Mr. Ohlinger: Then I take it it is withdrawn because I think you did offer it and the court did pass upon it.

The Court: It has not been passed upon.

Mr. Openlander: If I did offer it, I now withdraw it and offer now only the last portion of it.

Mr. Ohlinger: My notes show that Your Honor stated it would be admitted. Maybe I am wrong about it.

The Court: I said that in the absence of the jury, during the arguments. I have not formally admitted it.

As he has been proceeding to read, I have been formally admitting these documents for the record. This has not yet been formally admitted. I have not seen it. (Shown court.)

Mr. Openlander: I offer just the back portion there. That is the portion, Your Honor, which, according to the testimony of the witness, he admitted having sent in.

Mr. Ohlinger: Is that the exhibit that he showed to the witness?

Mr. Openlander: I believe the testimony—

The Court: You may ask him.

Q. Where did you get this pamphlet, Exhibit 3? A. As I testified yesterday, Mr. Gara gave me one exactly like it, but I could not say positively that is the one. But I believe there is a stipulation to the effect that it was.

Q. You gave it to me? A. That is right.

Q. The pamphlet Mr. Gara gave to you, you gave to me? A. Right.

Q. And this is the one he referred to in the final paragraph of his statement, where he says, "Following the passage of the Selective Service Act of 1948, I signed an open letter entitled, 'A Call to American Christians of Draft Age'"? A. That is correct.

Mr. Ohlinger: In view of the testimony of this witness, and what happened, we object to the action of the District Attorney now in seeking to offer only the part that he has indicated, instead of the entire document.

Mr. Openlander: I am not offering the rest of it because I don't think it is material. If the defendant wants to offer it, that is his privilege to do so.

Mr. Heisler: I should like the record to show, and the record will show, yesterday this document was offered, and the defendant objected to it as immaterial; that the court, in the absence of the jury, made a ruling that the document is to be admitted; and at this time it would not be proper for the District Attorney to change his mind and exclude that portion he does not think—

The Court: I can only admit what he offers.

Mr. Heisler: It was offered yesterday, Your Honor.

Mr. Openlander: I will say this for the purpose of the record; if I did at any time during the course of this trial offer the entire Exhibit 3, that I now withdraw that offer and make a new offer of only the last portion, which is referred to in this statement.

Mr. Ohlinger: We object to that offer, in view of the testimony of this witness. The document is a whole and can be offered only as a whole, and not simply the part of it the District Attorney desires.

The Court: As I understand, the record indicates that the defendant said to the witness that he tore off the portion that is now offered, signed it, mailed it in and subscribed to it; is that correct?

Mr. Openlander: That is what he says in the statement.

The Court: That is what you are now offering?

Mr. Openlander: Yes, Your Honor.

The Court: That will be admitted. The jury will consider it only—

Mr. Heisler: It is utterly senseless to include that part. It says, "I am in agreement with the open letter"—referring to the whole paragraph.

Mr. Openlander: Read the rest of it.

Mr. Heisler: "I shall do what I can to spread its message." What message? The jury will not know what the defendant is talking about.

Mr. Openlander: I will be amazed if this jury does not understand.

The Court: The court would like an opportunity to make a statement to the jury. Before he was interrupted when trying to make it. You will consider this document that is being offered only as going to the question of intent, as heretofore charged to you, and not as evidence of a separate offense. Proceed.

Mr. Openlander: This is addressed to the Peacemakers, Mount Morris House, 2013 Fifth Avenue, New York 35, New York:

"I am in agreement with the Open Letter. I shall do what I can to spread its message. If a youth of draft

age, I plan not to register or serve under the draft; if not, I shall in every way possible assist and support non-registrants." And it says: "Name," "Church Affiliation," "Address," "Age," and "Date."

Q. Now at this same time, Mr. Tootell, when you were interviewing—

The Court: Just a minute. The clerk says the record does not indicate that I admitted Exhibits 7, 8 and 9. I admitted Exhibits 4, 5 and 6, for which there have been substituted 7, 8 and 9.

Mr. Openlander: And 7, 8 and 9, as I understand it, are admitted.

The Court: They are admitted. Proceed.

Q. Mr. Tootell, at the time you were interviewing Professor Gara, I think you mentioned that his wife was there too? A. That is correct.

Q. And did you also interview her? A. We did.

Q. Did you take a statement from her? A. We did.

Q. Do you have a copy of that statement? A. Yes, sir. (Statement shown opposing counsel, also the court.)

Q. During the course of that interview—I am introducing this testimony solely for the purpose of showing, Your Honor, why Mrs. Gara is not charged.

Mr. Heisler: For that purpose we object.

The Court: Sustain the objection.

Mr. Openlander: I did not want defense counsel to comment upon the fact that Mrs. Gara was not here charged with her husband.

Mr. Heiser: Objection to the comment; we probably will.

Q. What did Mrs. Gara say about her activities concerning registrants?

Mr. Heisler: Objection, Your Honor.

The Court: You cannot have your cake and eat it too.

Mr. Heisler: I think Mrs. Gara is not a party to this lawsuit.

The Court: The court will forbid you to comment on it then.

Mr. Heisler: I said I object, and very likely the court will make a ruling. However neither the court nor the District Attorney knows what I or Mr. Ohlinger will do.

The Court: But you just said what you intend to do.

Mr. Heisler: Probably we will; but that does not mean, because one has something in mind, it will happen; therefore, to anticipate. It is not proper to bring in any evidence about Mrs. Gara.

The Court: I take it you did not mean what you said.

Mr. Heisler: I said it is not proper; whatever the District Attorney assumes, even on my conversation, it is not proper for any evidence to be introduced before the jury concerning Mrs. Gara.

The Court: Very well. I will sustain the objection.

Mr. Openlander: You may cross examine.

CROSS EXAMINATION

By Mr. Heisler:

Q. Mr. Tootell, you went first to Ropp Hall on the 8th day of November, 1948? A. That is correct.

Q. What was the purpose of your going there? A. To arrest Mr. Rickert.

Q. On what charge, do you know? A. Refusal to register under the Selective Service Act of 1948.

Q. Was there at that time an indictment against Mr. Rickert, do you know? A. There was not.

Q. Who gave you instructions to go out and arrest him? A. A complaint had been issued by the United States Commissioner, Mr. John J. Barone, here in Toledo.

Q. Did you see the complaint against Mr. Rickert? A. No, I did not.

Q. Well, how did you know, then, that there was a complaint issued against Mr. Rickert? A. I was told that one had been issued, and a warrant issued on top of that.

Q. By whom was that information given to you? A. Special Agent Paul W. Thompson, Federal Bureau of Investigation, in Toledo.

Q. Is he the man in charge? A. No, he is a fellow agent.

Q. You said there was a warrant issued? A. That is correct.

Q. From whom, from what office was the warrant issued? A. United States Commissioner John J. Barone.

Q. Do you know what was charged in that complaint against Mr. Rickert? A. Refusal to register under the Selective Service Act of 1948.

Q. Was there any date set when he refused to register, do you know? A. On or about September 10, 1948.

Q. When you went out there, then you said on your examination you met Mr. Gara, did you, in Ropp Hall? A. No formal introduction, no.

Q. I understand: did you know at that time Mr. Gara was Dean of Men at the college? A. I did not.

Q. When did you find it out that he was? A. Subsequent to that time.

Q. Did you have a conversation with him? A. With Mr. Gara?

Q. Yes? A. Yes, sir.

Q. Was it a pleasant conversation? Was there any violent conversation? A. On what date are you referring to?

Q. I mean the first time: we were talking about the first date? A. Nothing violent, no; Mr. Gara was a little bit excited.

Q. But he was otherwise pleasant to you, was he not? A. Yes, sir.

Q. Did he tell you that he was a member of the Religious Society of Friends? A. Not at that time.

Q. When did he tell you that? A. Subsequently, on November 15, 1948.

Q. Did he tell you that he was a Christian and he was interested in the problem of other Christian people who are in conflict with the law, at the first time? A. No, sir.

Q. Did he tell you why he was taking an interest in Charles Rickert and the arrest of Charles Rickert; again talking about the first time, Mr. Tootell? A. Nothing other than the statements which I have previously quoted.

Q. Do you recall that he told you something about being inwardly prepared? A. On November 8th?

Q. Or any time? A. No, sir.

Q. Did he ever talk about that he talked to other young people and supported them in their attitude with reference to the draft, provided they were as Christians prepared to take the consequences of their action? A. On November 8th?

Q. Or at any time? A. On November 15th, 1948, he stated that he did not go around indiscriminately advising men of draft age not to register.

Q. But whom did he refer to that he was talking to, if he was not doing it indiscriminately, but he was selecting the people with whom he was talking? What did he say about that? A. He said that if a man had already made up his mind not to register, was susceptible to that belief, in other words, then he would encourage and did encourage him not to register, to continue his stand.

Q. You don't remember he was in your discussion with him using the expression to be prepared in accordance with the teachings of Christ? A. No, sir.

Q. Did he use any reference to Jesus Christ and the teachings of Christ? A. I don't recall any direct reference to that, no.

Q. Do you recall any indirect reference to it? A. He did state that he was a Quaker, a member of the Society of Friends.

Q. Religious Society of Friends? A. That is true; that he did believe in non-violence and things of that nature.

Q. And did he at that time, I mean November 8th, or on November 15th during the second interview, try to tell you that those people who are inwardly prepared, they are willing to take the penalty irrespective of the penalty? A. No, I recall no such statement.

Q. You do not? A. No, sir.

Q. Did you ever hear that expression before, that a Christian is inwardly prepared? A. I never have.

Q. You are not very often in the position to arrest Christians for their actions, are you?

Mr. Openlander: Objection; immaterial.

The Court: Sustained.

Q. Do you know very much about the members of the Religious Society of Friends? A. I have heard of them.

Q. What did you hear of them; I mean before you went to talk to Mr. Gara?

Mr. Openlander: Objection.

The Court: Sustained.

Q. When you talked to him the first time, he may have told you that he is not going out talking to everybody in this community, but rather talking only to people who are inwardly prepared? May he have told you that? A. There was no inwardly prepared mentioned that I recall.

Q. Even though you do not recall it, he may have said so? A. I am sure he did not.

Q. Now then, Mr. Tootell, I am going to ask about Government Exhibit 2-A and 2-B. When you wrote down what you call a statement of Mr. Gara, allegedly made to you November 15, 1948, you submitted it to him for his signature, is that right? A. That is true; for reading and signature.

Q. He started to read, and then he made one correction, is that right? A. He made two corrections. One was in the spelling of his last name, G-a-r-a. I had misspelled it G-a-r-y. He said it was G-a-r-a. I corrected it in my own handwriting.

Q. I am going to ask you who crossed out the word "speech" on the first page, 2-A? A. I did.

Q. Why did you cross it out? A. Because it was misspelled.

Q. Who crossed out the words "I know"? A. Mr. Gara.

Q. Who crossed out the word "were"? A. I believe Mr. Gara also crossed that out.

Q. Who inserted the word "appeared"? A. Mr. Gara inserted the phrase "appeared to be."

Q. Who crossed out the word "any"? A. I did.

Q. When Mr. Gara made these corrections, did he not tell you that the whole statement is so incorrect, be-

cause of your lack of understanding of what he had in mind, he would not sign it, because it would be necessary to rewrite the whole statement? A. He did not.

Q. What did he say as to why he would not sign it, if he thought it was a truthful statement? A. He stated the contents were true; however he wished more time to think it over before signing it; that if we returned on the following day, he might sign it.

Q. Did he not tell you that the whole statement is so incorrect because even if he would have said to you on the 8th of November that he counseled Rickert, it could not have been true because he did not meet Rickert until after that date, did not talk to him until after that date; and therefore he cannot sign that statement because it is incorrect?

Question read.

Q. I will try to make my sentence shorter. Did not Mr. Gara tell you the whole statement is incorrect, and it would have to be rewritten before he would sign it? A. He did not.

Q. Did he not tell you there was some reference made to his counseling Rickert on September 10 or before that date not to register; and did he not say that that would be impossible because he never talked to Rickert about registering or non-registering until after September 10? A. May I answer that question in my own words?

Q. Of course, you do? A. As I testified yesterday, Mr. Gara stated it was not true that he had counseled Rickert prior to September 10, 1948, to refuse to register, because he had not known him prior to that time; that, however, after he had learned of Rickert's refusal to register September 10, 1948, he had encouraged him to stand firm in his stand.

Q. Yes; but your testimony was yesterday on direct examination that Mr. Gara told you that he counseled Rickert before September 10 not to register?

Mr. Openlander: No, I don't believe so.

A. There was one quotation which I made yesterday, I think, is what you are referring to.

Q. Yes? A. That was when Deputy Sheriff Loren D. Fairall, and I first arrived at Ropp Hall, November 8, 1948, to arrest Mr. Rickert for refusal to register under the Selective Service Act of 1948. At that time upon being met by Mr. Gara, he first asked us whether we were United States marshals. There was other conversation there; but it was at that time he made the statement, upon learning that I was from the F. B. I., "If you take Rickert, you must take my wife and me. We are just as guilty as he because we told him not to register."

As I stated yesterday—testified—subsequently, on November 15, 1948, Mr. Gara stated that—I asked him regarding that quotation—he stated that he might have said that in his excitement, but that it was not true; that in fact he had not known Mr. Rickert prior to September 10, 1948; and therefore could not have counseled him to refuse to register prior to that date.

Q. Mr. Tootell, if you were sure that Mr. Gara told you that in his excitement on November 8, when you went back on the 15th why did you go back to the statement and ask him whether or not he said that statement? So apparently you were not sure in your own mind he made that statement to you? A. I was positive in my own mind he made that statement to me.

Q. Why did you ask him about it? A. Because I was there for the purpose of interviewing him regarding statements made and actions which he had made prior to that time regarding registrant's refusal to register.

Q. Did you check into the fact that Mr. Gara did not know Mr. Rickert prior to September 10, 1948? A. He told me that himself.

Q. Did not Mr. Rickert tell you that Mr. Gara never talked to him about registration prior to September 10?

Mr. Openlander: Objection.

Mr. Heisler: This man was present. He brought this indictment—brought about this indictment. It is his duty as a government agent to find out whether or not the facts are so, that the crime could or could not have been committed.

The Court: He is not a prosecuting officer; he is merely a police officer.

Mr. Heisler: A police officer's job is to find evidence, on the basis of which an indictment may or may not be returned. If that was a crucial point, whether or not Gara was telling the truth, he could not have counseled because he did not know him, and subsequently Rickert was indicted and was in this court, was it not the policeman's duty to find out from Rickert whether that was true or not?

The Court: No.

Mr. Heisler: I submit I have different opinions concerning the duties of prosecution officers.

The Court: You may have them.

Q. Did you ever ascertain whether or not Gara told you the truth, he could not have counseled Rickert because he did not know Rickert prior to the 10th of September?

Mr. Openlander: Objection.

Question read:

The Court: He may answer.

A. I accepted Mr. Gara's statement as true.

Q. Did you so tell the District Attorney when you reported?

Mr. Openlander: Objection.

The Court: Sustained.

Q. If you accepted Mr. Gara's statement he did not know and could not have talked to Mr. Rickert prior to September 10, you accepted it as true, why did you then yesterday testify to a contrary statement which could not be true?

Mr. Openlander: Objection.

Mr. Heisler: I am asking, if he accepted Mr. Gara's statement that he did not talk to Mr. Rickert before September 10, why did he testify yesterday to a statement which could not have been true?

Mr. Openlander: What is the statement?

The Court: Tell the witness what you are referring to.

Q. I will reframe the question. If it is correct, as you now stated, that you accepted Mr. Gara's statement as true, namely, that he did not talk to Rickert, and, in consequence, could not have counseled Rickert prior to September 10, why did you yesterday testify a contrary

statement which could not be true, namely, that Gara told you that he counseled Rickert prior to September 10?

Mr. Openlander: Objection. I don't believe that is a correct statement at all.

The Court: I should like to have the reporter read the question so that I can see whether anybody can tell what it means.

Question read.

The Court: Do you want that question to stand?

Mr. Heisler: I should like to have the question stand.

The Court: If the witness understands it, he may answer. I do not.

Q. Do you understand? A. I understand what you are driving at, counsellor.

Q. All right? A. The reason was, if you recall,—I understood this trial here was for the purpose of getting at the facts—when I quoted that statement yesterday, I voluntarily also added to that what Mr. Gara told me on November 15, 1948, at which time he denied that that statement could have been true.

Q. Now, Mr. Tootell, when you were saying that you accepted Mr. Gara's statement concerning his first talk with Mr. Rickert as true, then you had certain facts in your mind, did you not? A. No. I believe a man is telling me the truth until I know to the contrary.

Q. Did you ever, before you testified before this jury, ask yourself the question: "Now should I bring in a statement which I am not so sure about?"

Mr. Openlander: Objection.

The Court: Sustained.

Q. Were you sure or are you now sure that Mr. Gara told you, November 8, that he counseled Rickert prior to September 10? A. I am.

Q. And at the same time you are sure he was telling you the truth that he did not know Rickert prior to September 10?

Mr. Openlander: Objection. If the court please, this last question illustrates what I meant to say before. May I have the question before the last?

Question before last read.

Mr. Openlander: The fact is that this man never testified that Gara told him he had counseled Rickert prior to the 10th of September. This man says, and his testimony is that when he went in there that day, Gara met him; and Gara says, "If you take that boy, Rickert, you must take my wife and me because we told him not to register."

Mr. Heisler: Objection to counsel testifying here.

Mr. Openlander: I am stating my recollection of the record. He did not say when he had counseled Rickert at all. Gara says, "You have got to take my wife and me because we told him not to register": not that "we told him not to register prior to September 10"; that is not what this witness said that Gara told him. And these questions defense counsel is putting to the witness all contain that statement: on September 10 or prior to September 10; and as the court well knows from our argument, it is our contention that this is a continuing offense, and that Rickert was just as guilty on the 11th and 12th and 13th and 14th as he is today.

The Court: I understand that. Objection sustained.

Mr. Heisler: May I point out, I asked this witness whether or not at the time he went to arrest Rickert, did he or did he not know on what date the charge said Rickert refused to register; and he said it was on or about the 10th of September.

The Court: All right. The thing that is bothering me, Mr. Heisler, is this: you ask the witness to tell what was said on these two visits. Then you ask him what was in the witness's mind; how did he interpret this or that? What has that to do—

Mr. Heisler: It is for the purpose of showing veracity; and that is very important for this jury; and it will be for the jury to determine whether or not this man could have believed both statements.

The Court: He is a police officer.

Mr. Heisler: A police officer should not believe two contradictory statements. If I may be permitted, I will take up another question.

The Court: All right.

Q. You stated on direct examination that Government's Exhibit 3 was handed to you by Mr. Gara? A. I stated that a copy of this "A Call to American Christians of Draft Age," similar to this, was handed to me; but it may have been the same; probably was; I don't know.

Q. Is that similar to the document handed to you by Mr. Gara? A. That is true.

Q. What did he tell you when he handed it to you? A. He thought I would like to examine it; gave it to me for my own use.

Q. Did you examine it? A. I did.

Q. Read it? A. I glanced through it.

Q. Did not Mr. Gara tell you that what he is saying about his Christian duties towards others is the thing what is in this Exhibit 3, and which was said by some few hundred Christian ministers in this country? A. He said that he had signed an open letter to Christians of draft age, similar to this, and that, as such, he advocated their stand. He did not say that was all he advocated.

Q. Did he tell you that basically what he is trying to tell you, whether he was excited or not, is exactly the same thing that is contained in this Exhibit 3, namely, "A Call to American Christians of Draft Age," calling upon them, as Mr. Gara pointed out to you, to "Be True to the Teachings of Jesus"? Did he not point out to you on the top of the pamphlet, "Be a Patriot and Serve Your Country's Real Interest * * * Refuse to Register for the Draft"? Did he not point out to you this cover page? A. I would like to correct one misstatement there. Mr. Gara was not excited on November 15, at the time that was handed to me. He may have been excited on November 8th, when he make the previous quotation.

Q. Did he point out to you that what he was trying to tell you on the 8th day of November, and what he was trying to repeat to you on the 15th day of November, is

something that is contained in this pamphlet, and if you want to understand it more clearly, you should take it home and read it? A. No, I don't recall him making that statement. He did say he subscribed to the contents of that, and did hand me that to take it home.

Q. Did he not ask you, since he subscribes to the content of this pamphlet, and if you want to understand what he subscribes to, you should read it in peace at home? A. No, I don't recall that.

Q. Now, Mr. Tootell, when Mr. Gara told you that you probably want to take this pamphlet, and he told you he believes in the content or subscribes to the content of this pamphlet, did he also tell you that he subscribes to it just the same way as those many hundred Christian ministers who subscribed their names to this pamphlet, and whose names appear on pages 5 to 11 of the pamphlet? A. He called my attention to the fact that a number of Christian ministers had subscribed to it.

Q. Did he, Mr. Gara, tell you that he himself, together with other religious people, subscribed to this pamphlet, subscribed his name to the pamphlet? A. His exact wording was, I believe, that he had signed an open letter; that is the way he worded it; and then he brought that out and said certainly that is one he signed, and one similar to it.

Q. Did he point out on the back of this pamphlet that, "I am in agreement with the Open Letter"? A. What open letter was referred to?

Mr. Openlander: Did you have any such conversation?

Mr. Heisler: I am asking him whether or not he pointed out to him what open letter this last page of the pamphlet refers to.

Q. I am going to show it to you, so that you will know what I am talking about? A. No, I don't recall any such conversation regarding that. He said he subscribed to the open letter; and that was the wording of that section there.

Q. And when he said he subscribed to the open letter, did he point out to you this pamphlet as the open letter? A. I gathered from his conversation that he had.

Q. That is, that Exhibit 3 is the open letter referred to on the last page of the pamphlet, is that right? A. I believe that it is.

Q. No, I mean from his conversation you got the impression that when he talked about the open letter, he referred to this pamphlet, Exhibit 3? A. He did not appear to be too sure himself; but that was particularly the contents; the contents of that is what he was referring to there. He said he was in agreement with the contents, and that I gathered that it probably was that.

Q. Did Mr. Gara read to you any part of this pamphlet or open letter, Exhibit 3, on November 15th, when he handed it to you, or before he handed it to you? A. I don't believe he read it to me. I believe there was one portion near the beginning he did point out to me.

Q. Which part did he point out to you, if you remember, Mr. A. I believe it was this paragraph marked No. 1 here.

Q. Who marked it, Mr. Tootell, did you? A. No, I did not; but as my recollection serves, I believe that was the paragraph he did point out to me.

Q. Will you read it to us, the paragraph that he pointed out to you?

Mr. Openlander: Objection.

The Court: What is the purpose of this, Mr. Heisler?

Mr. Heisler: Because I would like to show, Your Honor, that Mr. Gara, talking to this witness, referred always to Christians who are prepared to take their stand; and that paragraph that the witness, I believe, points out that his attention was called to is based on the understanding that if a member of his church goes out and talks to young people, that he will talk to only those who are prepared, who believe in the teachings as defendant does. I would like to point out that was the basis of the conversation between Mr. Gara and this witness; that he was not going out and talking to people without any discrimination, but rather that he was very much discriminating; that he would not talk to any one who was not, as he used the words, "inwardly prepared" to do so.

Mr. Openlander: The witness has stated on several occasions not only that he had no such recollection, but he has stated positively there was no such conversation.

The Court: I think four times he answered that question.

Mr. Heisler: May we ask what paragraph did Mr. Gara point out to him? The witness said at least one paragraph was pointed out to him. Can we ask which paragraph, for the jury?

Mr. Openlander: I think he already said it was the first paragraph. You asked him to read it, and that was my objection.

Mr. Heisler: The witness is looking at page 3 and has his finger on a paragraph here. There are a large number of paragraphs preceding. It cannot be the first paragraph.

Witness: I said marked No. 1.

Q. That is on page 3? A. Correct.

Q. Arabic numeral, one, on page three, beginning, "For young men we believe"—is that right? A. That is correct.

Q. How far is the paragraph going that was pointed to you? A. The only part he pointed out to me at that time was the part in—it seems to be italicized.

Q. The first four lines? A. That is correct.

Q. Did you read it in Mr. Gara's presence? A. I did.

Q. Did you read it out loud? A. No, sir.

Q. After you read it, was there any further conversation between Mr. Gara and you? A. Why, yes; that was pointed out near the beginning of the interview.

Mr. Heisler: May I be permitted to read to the jury these four lines, italicized?

The Court: What is the purpose of this?

Mr. Heisler: That there was conversation between this man and the defendant concerning the basic philosophy and underlying conduct of the defendant; to show that notwithstanding this witness' recollection about being inwardly prepared, it could not have been otherwise; that if Mr. Gara subscribed to the contents of this pamphlet,

obviously he would not have gone out and preached on the highways and byways, but was going to pick those people to talk to who were inwardly prepared.

The Court: Does that lessen the offense?

Mr. Heisler: I don't think that question is now pertinent because I ought to be permitted to present my defense.

The Court: I will sustain the objection.

Mr. Heisler: Exception. I move now that notwithstanding the government's adroit attempt to withdraw this Government Exhibit 3 and submit only part of it, the whole document should be accepted in evidence; since the witness has now testified that there was conversation between him and defendant and that portions of the pamphlet were identified by the defendant, and the defendant states that he subscribes to this pamphlet, and it would not be fair nor proper if only part of this exhibit would be admitted, because the government changes its mind about it.

The Court: I am trying to channel this along pertinent lines.

Mr. Heisler: I understand, Your Honor.

The Court: I do not want to get off on some tangent that may not have the remotest application to the matter under consideration, to-wit, the charge under the indictment.

Mr. Heisler: I want to do the same thing, and, I am sure, Mr. Ohlinger, too. I am going to present, as lawyers should, my evidence. I want to show we are acting in good faith. It is our purpose to show that the government is so wrong in indicting Mr. Gara—

The Court: Let us not have a speech. The jury is here.

Mr. Heisler: Can I point out what I am trying to accomplish with this here? My point is that the examination shows that Mr. Gara was discriminating between people with whom he would talk.

The Court: You have already said that.

Mr. Heisler: If he did not know Rickert, obviously he could not have known whether or not Rickert was inwardly prepared.

The Court: I think I will sustain the objection.

Mr. Heisler: I take exception, Your Honor. Our offer is rejected?

The Court: At this time.

Mr. Openlander: Offer of what?

Mr. Heisler: At this time, since we are trying to overcome the government's purpose in showing intent, we renew our offer to accept in evidence Defendant's Exhibit A, that was heretofore rejected, namely, the letter of Mr. Rickert that he wrote to the draft board.

The Court: What are you trying to do now?

Mr. Heisler: Trying to overcome the document that the government introduced, over our objection, to show intent. We are trying now, with the offer of Exhibit 3 in full, and by Defendant's A, to show that that intent was improperly shown; and that it was not the defendant's intent to violate the Act, as the government is trying to show by Exhibits 7, 8 and 9.

Mr. Openlander: That is apparently on the theory that Rickert is on trial.

The Court: You are offering Mr. Rickert's letter now?

Mr. Heisler: Yes, Your Honor.

The Court: The objection will be sustained. Proceed with your cross examination.

Mr. Heisler: That is all, sir.

Thereupon, the plaintiff called as a witness,

LOREN D. FAIRALL,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Openlander:

Q. Will you state your full name to the court and jury, please? A. Loren D. Fairall.

Q. Where do you live? A. Lima, Ohio.

Q. Where, in Lima, Ohio? A. 218 West Grand.

Q. What is your position or occupation? A. Chief deputy in the Allen County sheriff's office.

Q. And were you a deputy sheriff of Allen County on the 8th day of November of last year? A. I was, I was acting chief deputy at that time.

Q. Did you have occasion to go with Mr. Tootell from the Federal Bureau of Investigation over to Bluffton for the purpose of taking into custody a young man named Rickert? A. I did.

Q. And on that occasion did you see the defendant, Larry Gara? A. I did.

Q. Where did you see him? A. I saw Mr. Gara in Ropp Hall.

Q. That is a dormitory there at the school? A. For men, yes.

Q. You were with Mr. Tootell at the time? A. I was.

Q. Tell us what happened, and what was said by either Mr. Gara, Mr. Tootell or yourself at that time? A. When we entered Ropp Hall looking for Mr. Rickert, Mr. Gara met us at the door, and he said to us, "Are you United States marshals"? Mr. Tootell said no. Right at the left at the door was a register board or roster of the rooms and the students occupying them, and we were looking at that board for Mr. Rickert's room. In a few seconds Mr. Gara said, "Are you from the F. B. I.?" At that time Mr. Tootell told him he was. After he identified himself,

Mr. Gara said, "If you take Rickert you have got to take my wife and I. We are just as guilty as he because we told him not to register." If I remember correctly we got the number of Rickert's room off the board; but, if I remember, Mr. Gara told us also.

We went on upstairs to the right, looking for Mr. Rickert, and went up and then turned to the right and down the hall; and Mr. Gara at that time was upstairs and he went in the room, and he and Rickert came out and they went over into Rickert's room. Mr. Tootell and I went into the room. He asked Mr. Rickert if he was Charles Rickert. He said he was. Mr. Tootell told him he was under arrest. Mr. Gara was in the room at the time, and he said to Mr. Rickert at that time, "Stick by your principles. Do not let them coerce you into registering." And Mr. Rickert was changing shirts and putting on a necktie; and we started taking Rickert out of the room, and Gara said, "Do not let them change your mind."

Q. Said that to whom? A. I presume he said it to Rickert. He did not address him as "Charles," or "Mr. Rickert"; he said, "Do not let them change your mind." Then we proceeded to take Rickert down the hall, down to the car, and on down to Lima.

Q. That was the last you saw of Mr. Gara? A. That was the last I saw of Mr. Gara until today.

Mr. Openlander: You may cross examine.

CROSS EXAMINATION

By Mr. Heisler:

Q. Mr. Fairall, when you came there with Mr. Tootell, do you remember Mr. Tootell asked Mr. Gara, "Did you ever advise or counsel Mr. Rickert not to register"? Do you remember that direct question Mr. Tootell addressed to Mr. Gara? A. No, I don't remember that direct question.

Q. Do you remember Mr. Gara told him, "No, I did not. I could not have done so because I did not speak to Mr. Rickert before he refused to register"? A. No, I

don't remember hearing that part of the conversation.

Q. Do you remember what was the date on which it is charged that Rickert refused to register? A. I remember the date, November 8th, when we went up there and took him in custody.

Q. You don't remember when the charge maintained that Rickert refused to register? A. No, sir.

Q. Do you remember that Mr. Gara said—if I do not quote you correctly, correct me—he said to Charles, "Charles, do not let them coerce you to change your mind"? Is that right? Is that what you said? A. No, I did not say that.

Q. How did he say that? A. He said, "Stick to your principles and do not let them corce you into registering."

Q. Did you not testify just now on direct examination that he said, "Stick to your principles. Do not let them coerce you to change your mind"? A. No, I did not.

Mr. Heisler: May I have the court reporter read back his direct examination?

Thereupon, the reporter read matter referred to in direct examination.

Q. Which one did he say? A. He said both of them.

Q. How many times did he tell Mr. Rickert that he should stick to his principles? A. Once.

Q. How in one time could he say both of these things? A. I did not testify he did. That was two different statements, two different times.

Q. Two different times? A. Yes, sir.

Q. Once he said, "Stick to your principles. Do not let them coerce you to register"? A. That is right.

Q. And once, "Stick to your principles. Do not let them coerce you"? A. No, that is wrong. The last statement he said, "Do not let them change your mind."

Q. Do you remember when Mr. Gara told something to you and Mr. Tootell about if you take Rickert you just as well take Mr. Gara and his wife? Did not Mr. Gara tell to Mr. Tootell that "I am just as guilty because I am supporting Charles in his convictions"? A. No, sir.

Q. Did he say anything similar to that, "I am supporting Charles in his Christian convictions"? A. The statement I heard: want me to repeat it?

Q. Yes? A. The statement I heard: "If you take Rickert you have got to take my wife and I because we are just as guilty as he is, because we told him not to register."

Q. Did he tell you or in your hearing that he could not have told it to him to register or not to register, because he did not know him and did not talk to him on September 10, 1948? A. Not in my presence that I remember of.

Q. When was the first time that you talked to any one about the testimony that you were to give or that you are giving this afternoon here? A. When was the first time?

Q. Yes? Have you talked to any one about it? A. I didn't know it would be testimony at that time, the date we took Mr. Rickert into custody.

Q. To whom did you tell about your statements, what you heard Mr. Gara saying? A. I didn't tell anybody.

Q. Never told it to any one? A. No, sir.

Q. It is the first time you told it now, in the presence of the judge and jurors? A. Right.

Q. So that when Mr. Openlander called you, he did not know what you were going to testify about? A. That is right.

Thereupon, the plaintiff called as a witness,

WILLIAM W. STICKLE,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Openlander:

Q. State your name to the court and jury, Mr. Stickle, please? A. William W. Stickle.

Q. What is your occupation? A. I am a special agent of the Federal Bureau of Investigation, assigned to Cleveland.

Q. Where do you live? A. I live in Cleveland.

Q. Where, in Cleveland? A. Cleveland Heights, 2642 Princeton Road.

Q. Mr. Stickle, in connection with your duties as agent for the Federal Bureau of Investigation, did you have occasion to go along with Mr. Tootell for the purpose of interviewing a man by the name of Gara, at Ropp Hall, November 8, 1948? A. No, not on November 8th.

Q. I am sorry: what was the date? A. November 15, 1948.

Q. And were you present during the entire interview? A. I was.

Q. I hand you here papers that have been marked Government Exhibit 2-A and 2-B, and ask you whether or not that is a statement that was taken from Mr. Gara that day? A. It is.

Mr. Ohlinger: Well, now, Your Honor, I object to the conclusion in that question, that it was taken from Mr. Gara.

The Court: Yes. That will be stricken. You may reframe your question.

Q. While you and Mr. Tootell were talking with Mr. Gara that day, did any one make any notes of the statements made by Mr. Gara? A. Yes, we both did.

Q. You identify Government Exhibit 2-A and 2-B as the notes that were taken because of the statements made by Mr. Gara at that time?

Mr. Heisler: Objection to the leading question, Your Honor.

Question read.

Question withdrawn.

Q. What is Government Exhibit 2-A and 2-B? A. This paper is a paper which was written by Special Agent William Tootell during the time of the interview between Mr. Gara and Special Agent Tootell and myself on November 15, 1948, at Ropp Hall, Bluffton College, Ohio.

Q. And was Mr. Gara asked to sign that statement? A. Yes, he was.

Q. What did he say? A. Mr. Gara indicated to us that he did not desire to sign the statement at this time. As I recall it he stated that he would like to think it over. I think I remember that he said that he ought to take it up with others who were interested.

Q. Who questioned Mr. Gara? A. Well, both of us questioned Mr. Gara. Principally Mr. Tootell questioned him, and I made notes; however at the outset of our interview with Mr. Gara I spent about five minutes with him explaining to him the nature of what we were about to ask him in the way of questions, explaining to him he had no need, if he did not choose to, to make any statement to us; that we were there for the specific purpose of taking a statement; that if he chose to have a lawyer present, he might; and that as a matter of fact if he chose to make no statement at all, that would be all right, and we would be glad to go away. I also explained to him any statement he might make might later be produced in a court as evidence.

Mr. Gara indicated to me that he fully understood what I had just told him; thereupon, we proceeded to the business of our interview.

Q. You say you made some notes? A. I did.

Q. Do you have those notes with you? A. I do.

Q. May I see them, please? (Shown counsel.)

Q. Did Mr. Gara during this conversation say anything to you about any speeches that he had made?

Mr. Heisler: Object to a leading question based upon a document which is not introduced in evidence; it is not even marked in evidence.

The Court: Ask the witness if there was anything else said.

Q. Was there anything else said in addition to what you have told us? A. I do not quite understand the full scope of the question. A great many things were said, yes.

Q. Was there anything said about speeches that Mr. Gara had made? A. Yes, Mr. Gara spoke to us of two particular speeches that he had made.

Q. What did he say? A. He said that he had made a speech some time around the end of August, 1948, at a Friends' Meeting at Reading, Pennsylvania.

Mr. Ohlinger: Now, Your Honor, we object to this testimony about what was said about some time prior to September 10th.

The Court: The objection will be overruled. Is he going to proceed further to tell what was said?

Mr. Openlander: Yes, Your Honor, and I am offering it for the sole purpose of showing intent.

The Court: I will say to the jury that if there was any conversation or recitation made by the defendant concerning other acts or things done or said, they are to consider those only from the viewpoint of determining the knowledge or intention with which the charged remarks were made. They are not to be considered as evidence of separate and distinct violations.

Mr. Ohlinger: I take it that the objections we have made, and all the reasons we have given are in the court's mind with reference to this question?

The Court: Yes, proceed.

A. Mr. Gara told us that he had made a speech on or about August 25, 1948, at a Friends' Meeting House, I think he called it, at Reading, Pennsylvania, for the purpose of identifying himself with those who favored, I believe his term was non-registration. Throughout the con-

versation he consistently used the term "non-registration." I assume what he meant by that—

Mr. Ohlinger: Objection to what he assumes, Your Honor. That is manifestly improper.

Witness: All right. Now Mr. Gara also said that he had more recently—and I don't recall the date offhand—made a speech, which he referred to as the College Chapel Speech, at Bluffton College, in which he said, to the best of his recollection, he had not mentioned non-registration.

Q. Was there some conversation concerning this man Rickert? A. Yes, sir.

Q. Tell us what it was, please? A. We talked about Mr. Rickert's arrest; and we also talked about whether or not Mr. Gara had counseled Rickert not to register for the draft. To the best of my present recollection Mr. Gara's statement on this subject was, "No, I did not counsel Rickert not to register. I wish I had. If I had known how he felt about it, I would have."

Q. Did this defendant tell you of any conversations that he had with Rickert? A. I cannot recall specifically whether he did or not. I know we talked about it, but exactly what was said I could not say.

Q Drawing your attention to the notes which you say you made at the time, I ask you whether your recollection is refreshed from reading those notes?

Mr. Heisler: Objection.

Mr. Ohlinger: Objection. This is Mr. Openlander's witness and he is not permitted to prompt him.

Mr. Openlander: I am not prompting him; I am asking him if his recollection is refreshed from the notes he made at that time. It is purely preliminary and the proper way.

Mr. Heisler: Excuse me: may we read the document?

The Court: Let counsel read the document.

(Document shown counsel.)

Question read.

Mr. Ohlinger: Objection to refreshing the witness' memory. He is Mr. Openlander's witness.

The Court: Overruled. It is not a memory test. He may refresh his recollection from any notes he made at the time.

Q. I should like to have you answer this question, whether or not your recollection is refreshed as to any additional conversation with Mr. Gara concerning Mr. Rickert at that date? A. The answer is yes.

Q. Your recollection is refreshed? A. Yes, sir.

Q. Tell us, please, what, if any, additional conversation there was with Mr. Gara on that day as to conversations which he had had with Mr. Rickert? A. Oh: Mr. Gara told us that after Mr. Rickert had refused to register, Mr. Gara explained to him about his own prison experience as a conscientious objector, and what he, Rickert, might expect. Gara told us that he learned that Rickert had declared his intention of becoming a minister four years before the time of this conversation, when he entered Bluffton College. Gara stated that he advocated to Rickert that he continue to stand firm in his stand and continue to refuse to register.

Mr. Ohlinger: Now I ask all that testimony be stricken because plainly it is not testimony; the witness is just reading from a past statement. It is entirely hearsay and incompetent. It is very plain that he is just reading from a statement.

The Court: No, I do not think that is correct, Mr. Ohlinger.

Q. Mr. Stickle, do I understand correctly that the statement that you have just attributed to Gara, or those statements, were made by him during that interview? A. They were.

Mr. Openlander: Cross-examine.

CROSS EXAMINATION

By Mr. Heisler:

Q. Mr. Stickle, concerning that statement of Mr. Gara that he made after either you or Mr. Tootell asked him about counseling or not counseling Mr. Rickert to reg-

ister, what was his statement? A. Are you asking me to repeat what I just said?

Q. I would like to have you repeat? A. Mr. Gara told us that he had not known Mr. Rickert before.

Q. Before what? A. Before Mr. Rickert refused to register.

Q. Yes? A. He said that he wished he had known him, because if he had he would have counseled him to refuse to register, that is, if he had known what his attitude was.

Q. Whose attitude? A. Mr. Rickert's attitude.

Q. Did he tell you anything further, what he meant by it, if he had known what Mr. Rickert's attitude was? Did he explain? A. Oh: that Mr. Rickert intended to refuse to register.

Q. And did he tell you anything about other people and their attitude concerning the registration in this conversation? A. You mean other people in the College?

Q. Other people any place in the United States? A. Oh, he talked about that, yes.

Q. What did he say about whether he ever counseled anybody else? A. To the best of my recollection, Mr. Gara told us that he did not go about broadcasting counsel to refuse to register. He said that his personal belief impelled him to support any one who adopted the attitude of non-registration.

Q. Am I correct in stating that Mr. Gara told you, or to Mr. Tootell in your presence, that he supported those people who decided that their Christian principles prompt them not to register? A. That is correct.

Q. Did he not tell you or Mr. Tootell in your presence that it would be foolish to go out and tell youngsters not to register unless one knows what is their moral conviction? A. I believe that is a fairly correct statement of what Mr. Gara told us.

Q. Is it not a fact that Mr. Gara told you, or to Mr. Tootell in your presence, that it would be not in line with his thinking to advise any one unless that person knows and

is willing to take the consequences if he refuses to register? A. The question is a little involved.

Q. I will rephrase it. At about the same time that Mr. Gara told you he wants to know the moral conviction of the person before he supports him in his refusal, if he refuses, did he not say also that his, Gara's, conviction would not permit him to advise or counsel any one unless the person on his own arrives at the conclusion he does not want to register, and that person on his own knows what the consequences are and is willing to take the consequences? A. I believe he made a statement to that tenor.

Q. Is it not a fact that Mr. Gara also told you, or both of you—and I want you to answer no if you did not hear it, but I think you said all three of you were together—did not Mr. Gara say that in the case of Mr. Rickert, after having learned that Rickert refused to register, and after having learned about the moral convictions of Mr. Rickert, he, Gara, told Rickert he is going to support him in his stand? A. He did say that.

Q. After Rickert refused to register, is that right? A. That is what he told us.

Q. Now do you recall that Mr. Gara told you something else in addition to the things that you told counsel for the government and to me? Do you recall anything else? A. Not specifically, no.

Q. There was a conversation that lasted about two and one-half hours, is that correct? How long was it? I was not there so I do not know. A. Well, I think we started to talk to Mr. Gara, oh, sometime after four o'clock. We waited for him until after his class was completed, and we walked over with him from the Administration Building over to Ropp Hall. He invited us in. Later his wife came in, and we were all four in the room together. I don't recall exactly how long the interview was; probably about two hours.

Q. During that time—you may not remember everything—did not Mr. Gara present to you or to both of you a certain pamphlet he called an Open Letter, issued by

Christian Ministers? A. There was some pamphlet, issued by the Peacemakers, I believe.

Q. Yes? A. Which he very kindly gave us a copy of.

Q. Do you recall that the copy was similar to Government's Exhibit 3? A. It looks similar.

Q. And do you recall that he told you that his attitude—what you people from the government wanted to find out about—was pretty well described in this pamphlet? A. I believe he made such a statement.

Q. And did he say, "If you want to know more clearly about it, you read it?" A. I think he said that.

Q. Did he tell you many hundreds of Christian Ministers subscribed to this pamphlet? A. As I recall it, I think he stated about three hundred.

Q. Is it not a fact that he mentioned the names of some outstanding Christian ministers who signed that? A. I think he did.

Q. Do you recall any of those names he mentioned? A. Sorry, Sir, I do not. I didn't know any of them.

Q. If I read the names of any, would you remember them? A. I doubt it very much.

Q. Did he mention the name of an outstanding Christian minister in Toledo, Ohio?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you recall the location of any of those ministers whom he mentioned, the location of the churches? A. No, I do not, specifically. As a matter of fact, I never read the pamphlet.

Q. Did Mr. Gara, when he handed you this pamphlet, read any portions of it to you? A. He may have. I don't know for certain.

Q. If I am going to show you and you take a look at it, do you think you would recall whether or not he read any part of it, or pointed out any part of it for you to read, if you remember? Just take it (hands document). A. As I said before, he may have; but I don't recognize any particular section which he did read.

Q. You don't remember; that is perfectly all right: and you referred to the word, "Peacemakers." What was said about Peacemakers? Do you recall any more about it? A. Yes, we—I think I—asked him who were Peacemakers? What was this all about? I think at that time he produced this pamphlet or one like it, and said, "Here is who they are. They are a lot of Christian ministers throughout the country who believe as is set forth in this pamphlet." I accepted the pamphlet and took it with us, and I think eventually turned it in as possible evidence.

Q. Mr. Stickle, do you recall that Mr. Gara in his conversation with you stated over and over again, probably not exactly in these words but to that effect, that he would not talk to any one concerning registration or non-registration unless that person because of his Christian conscience was inwardly prepared to take the step along the line of his beliefs? A. Yes, I recall he made such statements several times.

Q. He used the words "inwardly prepared"? A. I don't remember that term.

Q. But something to that effect? A. Something to that effect, yes.

Q. Do you recall that he used the phrase "Christian morals"? A. Yes, I believe so.

Q. Did he use the phrase that one taking the step of non-registering must do so on the basis of his own individual Christian conscience? A. I believe he said something like that.

Q. And did he then state to you, once or more than once, and also to other agents, to Mr. Tootell, that he under no circumstances would take the responsibility to talk to any one who himself is not at the point that he is acting on the basis of his own Christian conscience? A. I think he said that.

Mr. Heisler: Thank you very much. That is all.

The Court: Any further questions?

Mr. Openlander: That is all.

(Recess.)

Mr. Openlander: If the court please, we have had some controversy concerning this Government Exhibit 3. I believe that certain portions of it are very definitely objectionable as having no place in this trial; but in order that the jury may have the benefit of examining so much of it as I believe is properly admitted, I am at this time going to offer the front, outside page, on which is marked Government's Exhibit 3, Pages 2 and 3 and 4 which follow it. I do not offer Page 5 to, it would be 11, inclusive, 11 being the inside of the back cover.

And I also offer the entire back cover of the pamphlet.

Because of the fact that I am offering only part of it, in event my offer is accepted and it is received in evidence I ask leave to have copied the front and these pages which I am offering, and to exclude the other pages which I do not offer.

Mr. Ohlinger: Your Honor, we object to that offer unless the entire pamphlet is received. This pamphlet has now been identified twice as the pamphlet given to the F. B. I. Agents, and it is a part of what took place on that day. Both of them have testified to it. I object to only a part of it being offered. I insist that if any part, all of it must be offered.

Mr. Openlander: I feel that by offering it, I have done all I can.

The Court: The objection will be sustained.

Mr. Openlander: With that—I believe I have offered all exhibits, and they have been received in evidence?

The Clerk: That is correct.

Mr. Openlander: With that, the government rests.

Mr. Ohlinger: I intended to produce, in connection with the circumstances as related by Mr. Tootell and Mr. Fairall and Mr. Stickle, the indictment of Mr. Rickert, and the record of his conviction and sentence in this court.

The Court: You say you offer that?

Mr. Ohlinger: We offer that.

Mr. Openlander: Not as part of the government's case, I take it.

Mr. Ohlinger: I offer it as part of the circumstances to which the government witnesses have testified.

Mr. Openlander: That is perfectly all right if he does it as part of his case, but it is no part of the government's case. In other words the government is opening its side of the case. We have now rested. If they want to proceed and as a part of their case offer it, I have no objection at all.

The Court: You have already offered the letter of Mr. Rickert. I don't know as the indictment was offered. But the letter has been refused. What is it you now offer of his?

Mr. Ohlinger: I offer the indictment of Rickert, and the judgment of this court of conviction.

The Court: That will be refused.

Mr. Openlander: In order that the record may be straight, I take it you are offering that now as a part of the government's case?

Mr. Ohlinger: Yes.

Mr. Openlander: Objection to that.

Mr. Ohlinger: This is part of the circumstances testified to by government witnesses here.

The Court: The offer is denied. You may proceed with the defense.

Mr. Ohlinger: At this point, Your Honor, we, in accordance with Rule 29, make a motion for judgment of acquittal, and we would like to present our points on that motion.

I have taken up with the District Attorney, however, this situation: we have one witness here that we would like to present. He cannot come back to-morrow. The District Attorney is agreeable, if it is acceptable to the court, that we make this motion, then hear the witness, and make our argument on the motion as though it were presented at the time the motion was made.

The Court: Very well.

Mr. Heisler: May I recall to the court that there was another motion supposedly made at the beginning of the afternoon session, which we could present at the same time.

The Court: If we have time, yes.

Mr. Heisler: Just that the record will show that it was made at the proper time.

Mr. Openlander: There is no question about it.

Thereupon, the defendant called as a witness,

ROBERT AMSTUTZ,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. What is your name, please? A. Robert Amstutz.

Q. Where do you live, please? A. Bluffton, Ohio.

Q. What is your address there? A. Rural Route 2.

Q. Occupation? A. I am a farmer and a student.

Q. Do you know the defendant, Larry Gara? A. Yes, I know the defendant.

Q. How long have you known him? A. Since about the latter part of September.

Q. You met him where? A. Bluffton College.

Q. Do you recall any conversation that you had with Mr. Gara, on or about September 10, 1948, concerning your own registration for the draft? A. I don't remember any statement on or about September 10th.

Q. Do you recall any date subsequent thereto a conversation you had with Mr. Gara? A. We had an informal conversation sometime in October.

Q. What year? A. 1948.

Q. Where was that conversation? A. Ropp Hall, Bluffton College.

Q. Who were present at that conversation besides Mr. Gara and yourself? A. I don't recall any other persons at that time.

Q. Will you tell the judge and jury what you said to Mr. Gara and what did he say to you?

Mr. Openlander: Just a moment. Objection.

The Court: Will counsel approach the bench?

Thereupon, there was an inaudible conversation among court and counsel.

The Court: The objection will be sustained. Counsel may make his offer to prove in due course.

Thereupon, the jury left the courtroom, and the following proceedings were had, to-wit:

The Court: I think you had better proceed to make your offer of proof in the record.

Mr. Heisler: If the witness now on the witness stand, Mr. Amstutz, would have been permitted to testify, he would testify that in the month of October, 1948, he had a conversation at Bluffton College, in Ropp Hall, with the defendant, Larry Gara; that during this conversation the witness told Mr. Gara that he, the witness, has quite some problem to decide what to do concerning registering and reporting in accordance with the Selective Service Act of 1948; that he was thinking this matter over, but could not decide whether he should or should not go through with the registration; that Mr. Gara told him, "The fact that you were not able to arrive at a conclusion; that you seemingly do not know what is the right and what is the wrong thing to do, you are not prepared inwardly; you are not prepared to stand up to a moral conviction which you have arrived at from your own consideration; you are not ready to follow what you consider the dictate of your

Christian conscience: therefore, if you ask my advice, my advice is that you should go through with your registration."

That the witness will further testify that he talked to other teachers and ministers; and that he subsequently proceeded and did complete his registration.

Mr. Openlander: Is that right?

The Witness: That is right.

Q. Do you think I told pretty well everything you told me about this conversation? A. I think that is a fairly good statement of it, yes.

Mr. Heisler: In connection with this offer of proof, I would like to state in the presence of this witness that on the first day of the trial, he accosted me in the corridor and told me whether or not I could use him if he has a statement to tell me; that he told me Wednesday, told me here; and I asked him to remain here; and he told me this afternoon he cannot be here to-morrow; and that was the purpose of offering his evidence to-day.

There is no objection to the offer of proof?

Mr. Openlander: The objection to the question was sustained, and now you have an offer to prove.

Mr. Heisler: I am making my offer to prove. The court may accept my offer of proof?

The Court: I have heard no objection to what you have said; so it may stand.

Mr. Heisler: If Your Honor please, at this time the defendant desires to present his motion—if the court will bear with us we would like to argue it, not too long—and that motion is for the acquittal of the defendant on the close of the government's case. This motion is made under the Rules of Federal Practice.

Thereupon, arguments were had to the court by counsel for the respective parties upon the motion.

Thereupon, court was adjourned for the evening, and the following proceedings occurred in the chambers of the presiding judge, to-wit:

Mr. Oblinger: The defendant moves this court for an order withdrawing a juror and discharging the jury

from further consideration of this case, and to continue the trial of the case, for the following reasons: that immediately prior to the convening of the court at two o'clock on this day, Mr. Tootell, one of the witnesses called by the government, was engaged in conversation with one of the jurors in this case, namely, Kirk Freye.

The Court: Which number is he?

Mr. Ohlinger: No. 4 from the left on the upper row of the jury. He took the place of Mr. Emmit. And in connection with this motion the defendant offers the evidence of Mr. Tootell, and we ask the court to examine Mr. Tootell.

The Court: Mr. Tootell, you have been sworn in this case as a witness, have you not, heretofore?

Mr. Tootell: I have.

The Court: It is said that you were in conversation with Juror No. 10, Mr. Freye, about two o'clock this afternoon just prior to the convening of the court after the noon recess. I wish you would tell me the occasion of that conversation, and I wish you would tell me who initiated the conversation, and what the conversation was, in full?

Mr. Tootell: Just prior to the court resuming session, at approximatey ten minutes of two, on this date, I entered the men's room, located approximately opposite from the United States Attorney's Office, on Floor No. 2, in the New Federal Building, here in Toledo.

Upon entering I noticed one of the jurors washing his hands at the lavatory. I entered the room to make use of the facilities afforded there. Upon completing that, I went to wash my hands, and as I arrived at the lavatory, this juror, whose name I do not recall—in fact I don't know his name—I must have heard it in court—he is the third juror from the right in the rear back row—he is from Ottawa, I remember that—he asked me if I knew Bill Bugas. I told him I did not. I said, "I do know a John Bugas." He said, "That is Bill's brother." I told him that I did not really know John Bugas; I had met him; but I knew of him much more than I knew him. He men-

tioned that John Bugas had an excellent job at the present time as vice-president of the Ford Motor Company. I said I knew that, and as of approximately two years ago, I heard his salary was $75,000 a year.

Knowing he was from Ottawa, Ohio, I asked him if he knew Aaron Christ. I told him I knew Arnold Potts well. Arnold Potts is Sheriff of Putnam County at Ottawa. There was another reference to Mr. Bugas, which I don't recall. Then he asked me—he knew I was from Lima, and asked if that was my territory. I told him that I had eight counties around Lima, including Allen County, Hardin County, Hancock County, Putnam County, Paulding, Mercer and Auglaize.

There was another reference to Mr. Bugas. I believe he mentioned this Bill Bugas; he had known him out in the west somewhere. Just about that point, Mr. Ohlinger, —I believe some one was with him. Was it Mr. Heisler?

Mr. Heisler: No, it was not.

Mr. Tootell: I remember you entered. I don't recall who else was there. It seems to me two people came in; and at that point I was asked if I knew a man by the name of Axtell. He said he did not recall Mr. Axtell's first name, but that he had been in the Bureau. I said I had known a man named Axtell in the Bureau; I believed he had been in Chicago when I was there. No time was mentioned, but it was back around 1941. I also told him, in Mr. Ohlinger's hearing, I believed Mr. Axtell to be presently in the Buffalo Office of the F. B. I.

With that I walked out. I don't recall whether this gentleman went out the same time I did, or whether he remained. That was the full conversation that I recall.

The Court: Was there any discussion whatever concerning the case being tried?

Mr. Tootell: None whatsoever.

The Court: Do you gentlemen want to examine the witness?

Examination by Mr. Ohlinger:

Q. Mr. Tootell, this Mr. Bugas that you refer to: was he also in the Bureau at one time? A. He was formerly

an Agent, and subsequently Special Agent in Charge of the Detroit Office of the Federal Bureau of Investigation.

Q. What was his first name? A. John.

Q. Is that the gentleman that Mr. Freye mentioned to you? A. No, it was Bill Bugas, a brother of John, that he mentioned.

Q. Which was the one he said he knew out west? A. Bill.

Q. Bill was the one that became vice-president? A. No, John did.

Q. Which was the one that Mr. Freye knew? A. Bill.

Q. And Bill is now what? A. I don't know. I never heard of the gentleman until that juror mentioned him.

Q. And John is what now? A. Vice-president of the Ford Motor Company, in charge, I believe, of labor relations, or something of that sort.

Q. Was either of these gentlemen in the Bureau at any time, either William Bugas or John Bugas? A. John was. As I said, he was special agent in charge of the Detroit office. He has not been in the Bureau now for several years.

Q. And which was the one that Mr. Freye knew? A. Bill.

Q. Not the one that had been in the Bureau? A. No, sir.

Mr. Ohlinger: Mr. Heisler?

Mr. Heisler: No questions.

Mr. Openlander: I should like to ask for the purpose of the record as to whether or not there is any claim on his part that Mr. Tootell has not told us about the entire conversation that was had there; if there is any question in his mind about it?

Mr. Ohlinger: Of course I do not know anything about it. I just was in there at the end, as Mr. Tootell has said. I came in and then went out before you and Mr. Freye went out; so I don't know about what occurred before.

Mr. Openlander: In other words, you have not any reason to disbelieve what Mr. Tootell has said?

Mr. Ohlinger: No, I do not have any personal knowledge; because all I heard when in there was that some one mentioned the name, Axtell. That was all I heard. That you say was at the end of the conversation?

Mr. Tootell: The entire conversation may have only taken a minute or two at the most. It takes much longer to tell it than it does to speak of this. I am not sure of this, but I think a couple of other people came in and out while we were there. I don't know who they were, however; I paid no attention to it.

Mr. Openlander: I believe the record should show that the toilet facilities for men are located on the second floor of the Federal Building here, directly opposite the United States attorney's office; and also directly opposite the retiring room for the jurors; and that this retiring room for the jurors is a small room, probably 10 x 14 feet, containing a dozen chairs or so; and that the door of that room is approximately a dozen or fifteen feet from the entrance to this men's toilet; that during the course of the trial the men's toilet has been put to use to a considerable extent by virtue of the fact that we have had approximately 125 or 150 students from Bluffton College here during the entire course of this trial; and that at least fifty per cent of those students are males, all of whom, I presume, at one time or another, have used the toilet facilities.

I think the record ought to show, too, that this toilet room is approximately 10 x 14 feet in size; and that there are two urinals and, I believe, three toilets.

The Court: I think the record may show that since this matter has come up, the court ordered the bailiff to provide a private toilet for the six male jurors during the balance of this trial, so that they will not come in contact with witnesses and the public generally at recess time.

I think the motion will be overruled and the record may so show.

The record may further show that both of counsel for the defense, the Assistant District Attorney, the defendant, the witness and the court were present at this hearing in chambers, following afternoon dismissal of the jury and recess over night.

Mr. Ohlinger: The record will show that we called attention to it promptly at two o'clock, though?

The Court: Oh yes.

Mr. Ohlinger: I think there should be a caution passed by Your Honor to everyone of us that no mention should be made of this.

The Court: I think that should be done because publicity in this matter while the trial is in progress could not help but work adversely to a fair trial.

I think that will be all.

Thereupon, the proceedings in the judge's chambers were concluded.

(March 11, 1949, Session.)

Thereupon, the jury returned to the court room, and the following proceedings were had, to-wit:

The Court: The motion heretofore argued to the court is overruled. You may proceed.

Thereupon, the defendant called as a witness,

ABRAHAM RICKERT,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. Will you state your name, please? A. Abraham Rickert.

Q. Where do you live, Mr. Rickert? A. Bluffton, Route 2.

Q. You are the father of one Charles Rickert? A. Yes, sir.

Q. Where is Charles Rickert at the present time? A. He was sentenced to Milan, the Correctional Institution at Milan, Michigan.

Q. Do you recall having had one or more conversations with your son prior to September 10, 1948, concerning his decision to register or not to register for the draft?

Mr. Openlander: I don't object to the answer if it is either yes or no.

The Court: He may answer yes or no.

A. No, no conversation.

Q. Did you receive prior to September 10, 1948, any letters from your son with reference to his decision to register or not to register for the draft? A. Yes, I did.

Q. When was it when you received such a letter? A. On or about June 20.

Q. What year? A. 1948.

Q. Do you have that letter that you received from Charles? A. I do not.

Q. Do you remember what Charles wrote to you on or about June, 1948, concerning his decision?

Mr. Openlander: I do not object if he answers yes or no.

A. Yes, sir.

Q. Please tell the judge and jury what Charles wrote to you about his decision with reference to registration?

Mr. Openlander: Objection.

The Court: Sustained.

Mr. Heisler: I take it, it is not necessary for us to take any exceptions to the rulings of the court.

Mr. Ohlinger: It is necessary, though, to make an offer of proof.

Mr. Heisler: I should like to make one offer of proof, if it is satisfactory to the court.

Mr. Ohlinger: Can we do that, Your Honor? We can make one offer that covers all of the questions.

The Court: Yes, you may do that.

Q. Do you know from your own knowledge whether or not Charles registered for the draft?

Mr. Openlander: Object.

The Court: Sustained.

Q. Do you know whether or not Charles was subsequently arrested for his failure to register for the draft?

Mr. Openlander: I am not objecting to that question. I don't think there is any question about it. As I understand it they are going to produce this boy on the stand here today.

Mr. Heisler: May I be permitted to present our defense? We are going along the line of our own humble knowledge.

A. Will you repeat the question?

Q. Do you know from your own knowledge Charles was arrested subsequently for his failure to register for the draft? A. Yes, sir.

Q. Do you know from your own knowledge whether or not he was tried for failure to register for the draft? A. Yes, sir.

The Court: What is the purpose of going into this?

Mr. Heisler: I am going to make an offer of proof.

The Court: You may make an offer of proof, but you cannot make it this way.

Mr. Heisler: I would like to have the one connected offer of proof, what this witness would have testified if he had been permitted to do so.

Question and answer read.

Q. When was that trial, Mr. Rickert?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Were you present at the trial of Charles?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you know from your own knowledge whether or not Charles was convicted for his failure to register?

Mr. Openlander: Objection: If the court please, that is not the fact, as I believe counsel knows.

Mr. Heisler: I do not know.

Mr. Openlander: Let me tell you.

Mr. Heisler: Do not tell me anything. I want to find out from my witnesses; not from you.

Question read.

Mr. Openlander: You mean convicted, as opposed to the entry of a plea of guilty?

Mr. Heisler: I put my question. Conviction in the English language means a very definite thing, and I don't think there are any semantics necessary to understand what it means.

Mr. Openlander: As I understand your interpretation of conviction, he was convicted after a trial to a jury. Is that what you mean by this question?

The Court: Is there an objection to the question?

Mr. Openlander: Yes, Your Honor.

The Court: Sustained.

Mr. Heisler: That is all, Mr. Rickert. May I make my offer to prove, Your Honor?

The Court: You may.

Mr. Heisler: The defendant offers to prove and says that if the witness, Abraham Rickert, would have been permitted to testify, he would have testified that some time in June, 1948, he received a letter from his son, Charles Rickert, in which letter Charles informed the witness that he, after long meditation, came to the conclusion that his Christian conscience compels him to refuse to register for the draft; and that such a decision is irrevocable; and that he is going to maintain such decision irrespective of the consequences. Charles also informed the witness in the letter mentioned that he did inform his draft board in writing that he reached this conclusion, and that he will deliver a letter to the draft board setting forth the reasons why he is unable to register, and why his decision not to register is irrevocable.

Mr. Openlander: We have no questions upon cross examination.

Mr. Ohlinger: If Your Honor please, we offer the indictment in the case of Charles Ray Rickert, and the

judgment and commitment therein, from the files of this court; and we ask leave to substitute copies for these papers.

Mr. Openlander: I have not any objection, Your Honor.

The Court: It may be admitted.

The Clerk: The indictment has been marked Defendant's Exhibit D; the judgment and commitment, Defendant's Exhibit E.

Mr. Ohlinger: And we ask leave to substitute copies for the papers offered.

The Court: You may have it.

Mr. Ohlinger: I would like to read these to the jury, having been received in evidence.

The Court: Proceed:

Mr. Ohlinger: Defendant's Exhibit D reads as follows:

"In the District Court of the United States

"For the Northern District of Ohio

"Western Division

"United States of America versus Charles Ray Rickert. Criminal No. 9505. Indictment.

"The grand jury charges that:

"On or about the 10th day of September, 1948, at Lima, within the Northern District of Ohio, Western Division, Charles Ray Rickert, being a male citizen of the United States, and being approximately twenty-one (21) years of age, failed and refused to comply with the provisions of the Selective Service Act of 1948, in that he refused to comply with the provisions of such Act by registering as therein provided, and in that he refused to answer certain questions put to him by the members of Local Draft Board No. 2 at Lima, Ohio, such information being required for proper registration of individuals under the provisions of such Act."

Mr. Openlander: Will you read the date on which that is filed?

Mr. Ohlinger: "January 4, 1949."

Exhibit E reads as follows:

"District Court of the United States, Northern District of Ohio, Western Division

"United States v. Charles Ray Rickert No. 9505 Criminal. Indictment in 1 count for violation Public Law No. 759.

"On this 20th day of January, 1949, came the United States Attorney, and the defendant Charles Ray Rickert appearing in proper person, and having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the court replied that he did not and,

"The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to-wit: Refused to register under the provisions of the Selective Service Act of 1948, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court, It Is By The Court

"Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eighteen (18) months.

"It now appearing to the court that the conditions of the bond given herein have been fully complied with, It Is Therefore Ordered that the clerk refund to the defendant the sum of $1,000.00 heretofore deposited in the registry of the court in lieu of surety on said bond.

"It Is Further Ordered that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

"(Signed) Frank L. Kloeb, United States District Judge.

"The court recommends commitment to Milan, Mich."

With the consent of the United States Attorney, I shall not read the small print at the bottom of this Exhibit E.

Thereupon, the defendant called as a witness,

CHARLES RAY RICKERT,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. State your name, please? A. Charles Ray Rickert.

Q. Where do you live? A. My home is in Bluffton, Ohio.

Q. You are at present confined in the Federal Penitentiary at Milan, Michigan? A. That is correct.

Q. You said that your home was in Bluffton. Prior to your conviction what was your occupation? A. A student at Bluffton College, in Bluffton also.

Q. Were you studying any particular profession or occupation? A. Yes, I was intending to enter the ministry.

Q. How far did you get in your studies towards the ministry? A. I was one semester short of graduation; my senior year at college.

Q. Now, Charles, on or about the 10th day of September, 1948, were you called upon by your draft board in Lima, Ohio, to appear and register under the Selective Service Act of 1948? A. That was one of the days assigned for registration, yes. That was my age group. Born in 1927, we registered the 10th or 11th of September.

Mr. Ohlinger: The 10th or 11th of September?

Witness: That is correct.

Q. Did you on either of those dates, the 10th or 11th of September, register for the draft? A. I did not.

Q. Did you appear at your draft board in Lima, Ohio? A. Yes, sir.

Q. Did you inform your draft board as to your determination to register or not to register? A. I informed them that I was not registering.

Q. Whom did you talk to, Charles? A. Well, one of the clerks, first of all, a lady, and, after that, I believe, the head of the local board, in his office.

Q. Will you please tell us as well as you can remember what did you tell to the person whom you thought was head of the draft board concerning your non-registration? A. I attempted to state some of my position in a short letter I addressed to any one who would be concerned. I presented that letter, first, to the clerk, and secondly to the head of the draft board, who I presume was the head of the draft board.

Q. I am going to show you what is marked Defendant's Exhibit A, a document containing two pages, and ask you whether or not you have seen this paper before? A. Yes, I have. That is my letter which I presented to the board, signed by me.

Q. When you presented this letter to the board, do you know whether or not the draft board man, whoever he was, read that letter? A. He looked at it for about two minutes. I think he could have read it in that time.

Q. After he looked at this letter, did you have any conversation with him concerning the contents of this letter? A. Yes, to a limited extent. He asked me to elaborate on a few of my ideas which I expressed in this letter.

Q. What did he say to elaborate on, what idea of yours? A. The reason for my position as a conscientious objector and as a non-registrant.

Q. What was your answer?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Did the draft board man ask you anything about changing your mind and registering?

Mr. Openlander: Objection.

The Court: Sustained.

Mr. Ohlinger: May we make the offers all at one time, without any prejudice to not making them now?

The Court: You may.

Q. Did you tell in this letter or in your conversation with the draft board officials when did you arrive at the conclusion that you are not going to register?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Charles, did you, or can you tell us now the approximate date when you arrived irrevocably at the conclusion you are not going to register?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Is there a date or was there a date when you arrived at a conclusion that you are not going to register?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Did you put it in writing, Charles, to any one, addressed to any one, when you irrevocably arrived at the conclusion that you will not register?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you recall when you the first time met Larry Gara? A. Yes, it was early in the school year, last fall, the second week, beginning the second week in September, which would make it approximately September 8th or 9th.

Q. Where did you meet Mr. Gara? A. It was in a class room in Bluffton College.

Q. Will you please tell the judge and jury everything that was said between you two at that time, everything?

Mr. Openlander: I think I will object.

The Court: Sustained.

Q. Did you at any time talk to Larry Gara about your problem with reference to registering or non-registering, not registering for the draft?

Mr. Openlander: Objection.

Mr. Heisler: I would like to state on this objection, it is so obvious what the government wants. They are charging Larry Gara that he counseled these men; and when I ask questions whether he talked to him, whether or not he counseled him by means of the Holy Spirit, and whether he talked to him directly, then they are objecting to it.

Mr. Openlander: I don't know what the attorney means when he says, "Did you talk to Mr. Gara about your problem."

Mr. Heisler: That is plain English.

Mr. Openlander: Not to me. That is not my kind of English. I don't know what kind of problem you are talking about. I don't know, when you ask him what was the conversation he had with Gara on September 8th—My Goodness—they might have talked about football or anything else. I don't know. I am trying to keep this record down. I think we are getting far afield.

Mr. Heisler: My point is he should tell everything. If he talked about registration that would be included. Our point is that he never talked to Larry Gara about registration before the 10th day of September.

Mr. Openlander: I don't think that statement proper from counsel in the presence of the jury.

Mr. Heisler: I am sorry. I did not mean to do anything improper.

The Court: The jury will disregard these statements. Is that material, Mr. Heisler?

Mr. Heisler: I think it is. Larry Gara never talked to this man about registration or non-registration before the 10th of September.

The Court: Is that material?

Mr. Heisler: Yes, I am sure, from my point of view.

The Court: I will sustain the objection.

Mr. Heisler: I submit to the court's ruling; nevertheless I believe it is very material.

There was an objection and there was no ruling on the last question.

The Court: Since your explanation of what you are getting at, I will sustain the objection.

Q. When was the first time you talked to Larry Gara in which conversation you or he mentioned the word "registration" for the draft?

Mr. Openlander: Objection.

The Court: He may answer that.

A. The first time the word "registration" was used was about on the date of September 20, 1948.

Q. Where was that conversation? A. It was in Mr. Gara's suite of rooms in our dormitory at college.

Q. Did you go there or did he come and seek you out? A. I went there at his request that I speak with him.

Q. Tell the judge and jury what Mr. Gara told you, and what you told him?

Mr. Openlander: I think I will object, Your Honor.

The Court: Overruled. He may answer.

A. Mr. Gara introduced himself at that time: the first time we were actually formally introduced. I had spoken to him before but not introduced by our names. He informed me he knew of a case from Bluffton College Campus, in which a non-registrant was involved for Selective Service. That was the first he had mentioned registrant to me. I told him he was correct in seeking me, because I was the one. He informed me that during the Second World War he was in a similar position as mine. He had also refused to register for Selective Service because of his religious principles. He told me he had served a sentence, and was again convicted a second time, and served two sentences in various federal prisons. I think at the time he asked me when I had come to my conclusion about registration. I mentioned at the time I was considering it the entire summer, the past summer, since the Act was made a law in the middle of June.

We did not have much time to discuss anything further. I think it was close to a class period at noon. I mentioned I would see him again. He also wished me the best of luck in the whole issue. At the time he also asked me if I had heard any further from the draft board; if they had written a letter or sent me a questionnaire asking me to register once again. I told him no, I had received nothing.

Q. When was the next time you talked to Mr. Gara during which conversation anything was mentioned concerning your position of non-registration? A. I think a day or two later, at which time he mentioned if I had any

other word at all from either the Federal Bureau of Investigation or the Selective Service Board. That occurred frequently because the issue was on the table of course, and he was as interested, or nearly so, as I was.

Q. When was the next time you and Mr. Gara had an opportunity to talk about your position not to register? A. As I mentioned, it occurred every few days, perhaps; sometimes maybe twice a day. I might add I lived in the same dormitory in which Mr. Gara was Dean of Men. We had frequent contacts that way; and in a small college, besides, you get to know the professors very well.

Q. During these meetings he asked you whether you heard anything from the Federal Bureau of Investigation and Selective Service Board, is that correct? A. Yes, sir.

Q. And your answer was— A. No, each time.

Q. Calling your attention to the 8th day of November, 1948, do you remember that date? A. The 8th of November?

Q. Yes? A. Very well.

Q. Will you please tell the court and jury what happened at that time with reference to your meeting with Mr. Tootell and another gentleman, and your meeting with Mr. Gara on that day? A. Yes; on November 8th, at approximately one o'clock in the afternoon, I just finished my work in the dining hall there at the dormitory where I work, and I had gone up to my room. And I imagine you want everything: I had gone to the lavatory to brush my teeth. I had just about completed that chore when Mr. Gara came into the lavatory there and informed me that two gentlemen were there to see me. I went back to my room and they were approaching down the hall at that time.

Q. These two gentlemen? A. That is right.

Q. Did you know them before? A. No, never met either of them.

Q. All right? A. I showed them into the room, and also invited Mr. Gara to come in. My room-mate left for class at that time, so it left four of us in the room. The four were myself, Mr. Gara and the two unknown gentle-

men previously to this time. Mr. Tootell, Federal Bureau of Investigation Agent, introduced himself and showed his indentification.

Q. Do you see him in the court room? A. Yes, at the desk there.

Mr. Heisler: The record shows he identifies Mr. Tootell.

Q. All right, go on? A. The other gentleman was not introduced, but I believe he was a deputy sheriff of Allen County. I invited them to sit down, if they would; but they informed me they did not have much time; and of course I knew the reason why also. Mr. Tootell told me he was to pick me up and place me under arrest because of a violation of the Selective Service Act of 1948.

Q. Did he tell you on what date it was claimed you violated the Selective Service Act? A. No, he did not.

Q. Go on? A. I guess I did not answer him at all. Mr. Gara then spoke up and mentioned—addressed the two gentlemen and mentioned something about conscription for war duties and, just in a very brief sentence, some of his beliefs and his conscientious scruples against war and against conscription.

Q. Do you remember the words he was using at that time, Mr. Gara was using in that connection; can you tell us, as well as you remember? A. He said he thought the Selective Service Act which forced men to join armed forces was unchristian. He may have used the word "unamerican" also. He said he thought that taking a young man out of school was a criminal offense in itself; something to that effect. He also stated that he, too, believed as I did. I don't believe he elaborated further on that.

Q. What then was said to you? A. Nothing, immediately. Shall I relate the entire conversation?

Q. Yes? A. I think then one of the gentlemen, Mr. Tootell, turned to Mr. Gara and said, "This concerns only the three of us." I went to the closet, got a tie and put it on. Mr. Gara again mentioned something of the conscription issue. He said that he, too, was as guilty as I. Mr. Tootell again turned to him and said, "Did you tell

this boy to refuse to register?" Immediately Mr. Gara said, "No. I am sorry I did not have the opportunity to." I put on my tie, got my jacket and said, "I am already to go." We left our room, went down to the first floor of the dormitory; and as we were going through the hall or leaving the front door, I can't recall exactly which, Mr. Gara said, "Well, goodbye, Charles. Make sure you know what you believe, and do not let them coerce you into changing your mind." I said, "Thanks, anyway; but I am quite sure of my principles. So Long." It was like the tip of the hat: Goodbye.

Q. Did Mr. Gara at any time counsel you not to register?

Mr. Openlander: Objection.

The Court: Yes. He has already told the conversation.

Mr. Heisler: The wording of the indictment is that Gara counseled this man not to register. I think it is proper to ask in the wording of the indictment, whether that is so. This is the man who would be on the face of the earth the best witness to say whether he was counseled; not the government.

The Court: The court has permitted him to tell any conversation that he had with Mr. Gara, and you are putting a general question.

Mr. Heisler: That is generally relating to the indictment against Mr. Gara.

The Court: I know.

Mr. Ohlinger: Does Your Honor's rule fix any dates for conversations?

The Court: He asked the conversations, and he answered what the conversations were. But to answer a conclusion is improper.

Mr. Heisler: May I point out the court ruled against me when I wanted him to tell everything about prior conversations.

The Court: I am allowing him to do that.

Mr. Heisler: I was excluded before. I was asking what was said during the first conversation.

The Court: I will sustain the objection to the question as you have put it. Proceed.

Q. You said that you were thinking about the registration under the Selective Service Act the whole summer. Were you at a Christian encampment during the summer of 1948 in the United States at a time when a report came out that a law went into effect as to registration?

Mr. Openlander: Objection.

The Court: He may answer yes or no.

A. Yes, sir.

Q. Where were you?

Mr. Openlander: Objection.

The Court: He may answer.

A. At Lake Geneva, Wisconsin; at a College Camp of the Y. M. C. A.

Q. Was Mr. Gara present at the same encampment? A. No, he was not.

Q. Were there other people present in addition to yourself? A. That is right; quite a number.

Q. Did you discuss with them your thought about registering for the peace-time draft?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Did you tell the court and jury all of the conversation that you had with Mr. Gara in which conversation the words, "registering for the draft," or words to the same effect, were mentioned? A. Yes, I have.

Mr. Heisler: That is all.

Your Honor, may I make an offer of proof?

The Court: You may.

(Defendant would prove, if this witness would be permitted to testify, that he did not at any time speak to Larry Gara prior to the time that he, on the 10th day of September, 1948, presented the draft board with his written statement concerning his refusal to register, which written statement is Defendant's Exhibit A. He would further testify that Mr. Gara at no time counseled him to register or not to register; that at no time did he aid

or abet him to reach a conclusion not to register. Witness would further testify that Mr. Gara learned about witness' refusal to register only about eight or ten weeks after the same was brought to the attention of the draft board; and that when the witness for the first time met Mr. Larry Gara and talked to him about his non-registration, the witness' decision not to register was made irrevocably, without any possibility of change.)

Mr. Heisler: If Your Honor please, the defendant offers here Exhibit A, being the letter of Charles Ray Rickert addressed to the Draft Board.

The Court: Is there any objection.

Mr. Openlander: I think I will object, Your Honor.

The Court: Sustained.

Mr. Ohlinger: Your Honor does not care to receive any reasons why this should be admitted?

The Court: I think not.

Mr. Heisler: Just one question more. May I?

Mr. Openlander: Yes, indeed.

Q. Charles, you are the same Charles Ray Rickert who was indicted in accordance with Defendant's Exhibit D? A. That is correct.

Q. And do you know that you were indicted, that you on or about the 10th day of September, 1948, failed and refused to register? A. That is right.

Q. You are the same Charles Ray Rickert who subsequently was tried and pled guilty to the charge of refusal to register? A. That is right.

Mr. Heisler: That is all.

CROSS EXAMINATION

By Mr. Openlander:

Q. Charles, I believe you told the jury that at the time of your arrest you were a divinity student there at Bluffton College, and that you were in your senior year? A. That is correct.

Q. You were a divinity student at Bluffton College for how long? A. Actually it is predivinity student because it is a theological seminary. I had decided in my freshman year, which was 1945.

Q. You registered under the Selective Service Act of 1940 when you were eighteen years of age, did you not? A. That is correct.

Q. You registered at that time with, I believe, Selective Service Board No. 3, in Lima? A. I am not sure of the number; it was in Lima.

Q. And at that time, in answering the questions on your questionnaire, you asked that you be deferred from service because you were a divinity student, did you not? A. That is correct.

Q. And the draft board deferred you on that ground? A. That is right; not the Lima Board, however; I was living in Canton at that time, and the Canton Board—

Q. In any event you were deferred under the first Selective Service Act, the Selective Service Act passed in 1940, because you were a divinity student? A. That is correct.

Q. You have testified that to your recollection the first time selective service was mentioned between you and Mr. Gara was about the 20th of September? A. About the 20th of September, yes.

Q. I believe you said that at that time you told Mr. Gara that you had refused to register, and he told you of the fact that he had been sentenced twice for failure to register; is that right? Is that what he said? A. Once for failure to register, and once for failure to return his questionnaire.

Q. In other words he had two violations of the Selective Service Act himself, is that right? A. That is correct.

Q. And then he asked you when you came to the conclusion not to register; that is right, is it? A. That is right.

Q. And then I believe you said that Mr. Gara said that he would see you again, and he wished you the best of luck on the whole issue? A. The words were something in that vein, yes.

Q. Can you be any more specific in what he said? A. I cannot repeat the exact words. That is six months ago.

Q. The import of the words was he wished you the best of luck on your refusal to register, is that it? A. In the things that would come out of it.

Q. In the outcome of your refusal to register, he wished you the best of luck, is that it? A. That is right.

Q. Is that a fair statement? A. Right.

Q. Then I believe you said that from that time until you were taken into custody, you saw Mr. Gara every day or so, or sometimes a couple of times a day? A. That is correct.

Q. And that every day or so, or sometimes a couple of times a day, he would ask you about your status so far as the Selective Service was concerned? A. That is right.

Q. What would he ask you? A. He would ask if I had received any word, through mail or otherwise, on my situation.

Q. Would he say anything else? A. At various intervals he also would mention some of his experiences.

Q. How do you mean, some of his experiences? A. Well, he was in the situation that I was to face. As I mentioned, he had spent over two years in prison in the Second World War; and frequently he would mention some of the type of gentlemen he would find or would speak with. He mentioned the very circumstances that I would expect to find, wherever I was sent. He mentioned the kind of food we ate; the type of lighting, fluorescent, he mentioned. It was in general words—

Q. If I get it right, he told you what you could expect? A. If I were convicted or pleaded guilty.

Q. Or taken into custody or convicted? A. That is right.

Q. And those conversations would take place sometimes a couple of times a day? A. Not in its entirety, no. Often when I would see him or meet him, we would simply speak or say hello. But sometimes we did discuss these issues. I also was in one of his government classes. We had that to speak of too. Our conversation was not based entirely on selective service or prison life, no.

Q. It was my understanding, in answer to one of the questions Mr. Heisler asked you, you said the conversations occurred frequently; every few days, maybe twice a day, conversations about selective service?

Mr. Heisler: No, I did not ask that.

Mr. Openlander: I am asking the witness to answer.

A. No, I did not understand him to ask that; I understood him to say how often I met—

Q. How often would you have these conversations with Mr. Gara about selective service? A. We did not have any calendar we went by, but it was probably on the average of once a week, I would say.

Q. Were there other times, in addition to those conversations once a week, when probably passing in the hall, and when you would see him, he would say, "Well, have you heard anything more from the Selective Service Board," or something like that? A. You ask if he said that?

Q. In addition to those conversations when he told you what you could expect if you went to a government penal institution; in addition to those conversations were there times when he would meet you in the hall or other places, when he would say, "Well, have you heard anything from the Selective Service Board about your failure to register"; something like that? A. Yes, that was mentioned.

Q. I believe you said that when Mr. Tootell and this Deputy Sheriff down at Lima were there, Mr. Gara at that time voiced his opinion that this Selective Service Act was unchristian and unamerican; something like that? A. I cannot state if he used those exact words.

Q. But in general? A. That is right.

Q. And that he felt taking a man out of school was a criminal offense; something like that; not those exact words? A. That is correct.

Q. And that Mr. Gara said then that he too believed as you did? A. That is correct.

Q. And he also said that he was as guilty as you were? A. I believe he used that expression.

Q. And then you said that Mr. Tootell asked him whether he told you not to register; and that Mr. Gara said, "No. I am sorry I did not have the opportunity to."? A. That is right.

Q. And then during the conversation he said, "Make sure you know what you believe, and do not let them coerce you"— A. Yes—"into changing your mind."

Q. "Into changing your mind"? A. That is correct.

Q. That is a fair statement according to your recollection of what happened down there? A. That is.

Mr. Openlander: That is all.

REDIRECT EXAMINATION

By Mr. Heisler:

Q. The prosecutor asked you whether or not on or about September 20, when first you talked to Mr. Gara about your decision not to register, whether Mr. Gara asked you how did you arrive at your decision?

Mr. Openlander: No, I did not ask that.

Mr. Heisler: May I have the court reporter read the question. It was the opening question on cross examination, I understand.

Mr. Openlander: Let him read it.

Question and answer read.

Q. Mr. Rickert, during the many conversations with Mr. Gara following the 20th of September, 1948, did you ever tell him about the time when you arrived at the conclusion that you will not register for the draft?

Mr. Openlander: Objection. I do not object to a yes or no answer.

The Court: He may answer the question.

A. Yes, sir.

Q. Did you tell him the date when you arrived at such conclusion?

Mr. Openlander: Objection as immaterial.

The Court: He may answer.

A. I told him it was very soon following the date of the passage of the Selective Service Act.

Q. Did you give him an approximate date when you finally concluded that you will not register?

Mr. Openlander: Objection.

The Court: I will sustain the objection to that question. Counsel will not do that.

Q. Did you tell Mr. Gara the approximate date, shortly after the law went into effect, when you reached your conclusion?

Mr. Openlander: I don't know that it makes any difference. I believe he testified to it before that he told Gara that he reached the conclusion not to register in the middle of June. That went in over my objection on the direct examination. It has been answered.

The Court: He may answer again.

Q. Did you give him the date? A. That first answer was right; it was approximately June 20.

Q. Did you tell Mr. Gara whether or not on that date you informed anyone in writing that you reached such conclusion?

Mr. Openlander: I objected to that before and it was sustained.

Question read.

The Court: Objection sustained.

Mr. Heisler: That is all.

I should like to make an additional offer of proof, Your Honor.

The Court: You may.

(If this witness would be permitted to testify, he would testify that on or about June 20, upon reaching the final and irrevocable conclusion that he will not register, he wrote to his father to that effect; and that he told to Mr. Gara that he wrote such a letter.)

Thereupon, the defendant called as a witness,

LENNA MAE GARA,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. What is your name? A. Lenna Mae Gara.

Q. You are the wife of the defendant, Larry Gara? A. Yes, sir.

Q. What is your occupation, Mrs. Gara A. At present I am a student.

Q. Where are you a student? A. Bluffton College.

Q. Please do not answer my question until counsel has a chance to object and the court rules. If the court rules you cannot answer, please do not answer so that there should be no mistake about it. Do you recollect the 8th day of November, 1948, the visit of Mr. Tootell and another gentleman, and a certain conversation that was had between them and your husband, Mr. Gara A. Yes, sir.

Q. Do you recall during that conversation whether or not Mr. Tootell asked Mr. Gara whether or not he ever counseled Charles Rickert not to register? You answer yes or no. Do you recall that question? A. Yes, sir.

Q. Were you present at the second conversation between your husband and Mr. Tootell and another gentleman on the 15th day of November, 1948? A. Yes, sir.

Q. During one or the other of these conversations—I don't remember which one—Mr. Tootell asked, did he not, your husband whether he ever counseled Charles Rickert not to register? Do you remember that question? A. No, sir.

The Court: Just let her tell what was said, without leading her.

Q. All right, Your Honor. I just thought I could shorten this matter, and I did not want to have conversation so that he can object. Tell us not everything said but just the pertinent matter what we are after with reference to Charles Rickert, the conversation between Mr. Tootell and your husband, what was said by each one and what was answered by the other, as well as you remember? A. On November 8th, when I came where the men were speaking, and my husband had just said, "Have you come to arrest Charles"; and Mr. Tootell said, "Yes"; and my husband said, "If you take him you should take both of us" or "my wife and I too"—"because we take the same position."

Q. The same position as who? A. "We take the same position as Charles." On November 14th Mr. Tootell asked my husband; he said to him that he had understood him to say on November 8th that he had told Charles not to register; and he asked my husband if that was correct. My husband said no.

Q. Was anything else said with reference to that question? A. He said no, he had not done that, because he did not have the opportunity. He explained that to him.

Q. Do you recall anything else concerning this matter, the conversation or any part of the conversation? A. No, sir.

Q. Do you recall that Mr. Tootell asked your husband whether or not Charles Rickert ever wavered in his determination not to register, and whether or not he encouraged Charles Rickert on that? The question should be answered yes or no?

Mr. Openlander: Objection. It is leading.

The Court: Sustained.

Mr. Heisler: I asked if she remembered anything else.

The Court: You may ask her if she remembers anything else.

Mr. Heisler: I first exhausted her memory. I can ask again.

Q. Do you recall anything further in addition to what you have testified to concerning the conversation either on the 8th or 15th of November? A. On the 15th my husband explained that we both supported Charles; and I think he explained again we both agreed with him, and we have told him many times we agree with him and that we support him in his position.

Q. Anything else you remember? A. My husband explained that we had not urged Charles to do anything, because Charles had done it, what had to be done; and further that he would not do that to any person whom he did not feel was absolutely prepared in his own mind and in his own conscience to take that position; and that he put a great deal of emphasis on that fact.

Q. Do you recall anything else? If you do not, you may say so? A. No, sir.

Q. Do you recall that Mr. Tootell asked your husband whether or not Charles ever wavered in his determination not to register?

Mr. Openlander: Whether Tootell asked that?

Mr. Heisler: Yes, whether Tootell asked, in her hearing.

Q. Will you answer yes or no, whether you recall it? A. Yes, sir.

Q. What was your husband's answer? A. He said not to his knowledge, he never wavered.

Q. Do you recall whether Mr. Tootell asked your husband that he told Charles under conditions of wavering that he should not change his mind? Did he ask that question? Do you remember it? If you do not remember, say so. A. I don't remember.

Mr. Heisler: That is all.

CROSS EXAMINATION

By Mr. Openlander:

Q. Mrs. Gara, I direct your attention to Government Exhibit 2-A and 2-B. I want you to look them over. (Witness does.) Were you present on the 15th of November when that statement was made? A. Yes, sir.

Q. Your husband read it over? A. Yes, sir.

Q. I direct your attention to Government's Exhibit 5, and also to Government's Exhibit 8—Exhibit 8 is a copy of Exhibit 5—and I ask you whether or not that is your signature on Exhibit 5? A. Yes, it is.

Q. Did you read that before you signed it? A. Yes, sir.

Q. Who typed it? A. My husband.

Mr. Ohlinger: We object to going into this exhibit because that was not gone into on our direct examination. If Mr. Openlander wishes to call this witness as his witness, that is his privilege.

The Court: Yes, I think your cross-examination ought to be limited in scope to that of the direct examination.

Mr. Openlander: I believe under the rule I can make her my witness. I did not intend to do it.

Mr. Heisler: You want to do that?

Mr. Ohlinger: He says he does not want to.

Q. Now, Mrs. Gara, during this interview on November 15th, I believe you testified in response to a question asked by your husband's attorney, you said that your husband explained to Mr. Tootell and the other man who was there from the Federal Bureau of Investigation, that "We both support Charles and have told Charles many times that we support him." Is that right? A. Yes, sir.

Q. What did you mean by that, "We have told Charles many times that we support him"? A. I mean we made it clear to him; I don't know how we told him; but he understood, I am sure.

Q. That what? A. That we agreed with him; that if we were called upon to register for any such draft law,

we would take the same position that he took; and that we admired him in his stand; and that we hoped that he would follow his conscience, if that is what his conscience told him to do.

Q. In other words, so far as you were concerned, you gave him to understand that you were with him in his resolution; is that right? A. Yes, sir.

Q. How often would you see Charles? A. Every day.

Q. How often did you talk with him about it? A. I could not say.

Q. Can you give us a rough idea? Would it be once every couple of days, once a week or oftener than that? A. Approximately once every couple of days.

Q. While you were in the courtroom here during the first days of this trial, you heard Mr. Tootell, and Mr. Fairall—I believe his name is—Deputy Sheriff of Lima, say that on the first day when they went down there to arrest Charles Rickert, your husband said to them, "If you take Charles you have to take us too. We are just as guilty as he is because we told him not to register"? It is your recollection that those are not or were not your husband's words, is that right? A. That is right.

Q. You say that he said, "If you take him, you should take us because we take the same position."? A. That is what I said.

Q. And that is what you say was said on that day by your husband? A. Yes, sir.

Q. Do you remember on the 15th, when your husband was being questioned by those men and he was asked about that, he told them he might have said those words and the words "We told him not to register" because he was a little bit excited; but that, as a matter of fact, he could not have told him before the 10th, when Charles first refused to register, because he did not know him? A. No, sir.

Q. Do you remember that conversation? A. I remember the conversation.

Q. Remember your husband saying that, that he might have said, "We told him not to register"; but that he was excited, and that it could not have happened? A. No, sir.

Q. Would you say he did not say that? A. I would supplement what you have said.

Q. Would you say he did not say those words? A. Yes, sir.

Q. At no time during that conversation? A. Yes, sir.

Q. I assume that since your husband's arrest you have discussed the case with him, have you? A. Yes, sir.

Q. Did you have any discussion about these words since the trial started? A. Yes, sir.

Q. In the last day or two, since the trial has been going on? A. Yes, sir.

Mr. Openlander: That is all.

REDIRECT EXAMINATION

By Mr. Heisler:

Q. You told Mr. Openlander your husband did not use those words; that he might have said something; but was excited; and then you said, "If I may, I should like to supplement your question." What did you want to tell in answering that question to Mr. Openlander? A. He said "I might have said it because I was a little upset; but I did not."

Q. Are you a Quaker yourself, Mrs. Gara? A. No, sir.

Q. What church do you belong to? A. I am a member of the Congregational Church.

Mr. Heisler: That is all.

Mr. Openlander: That is all.

Thereupon, the defendant,

LARRY GARA,

called as a witness and duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. What is your name? A. Larry Gara.

Q. How old are you? A. Twenty-six.

Q. Where do you live? A. Ropp Hall, Bluffton, Ohio.

Q. What is your occupation or profession? A. I am a teacher, and I am acting as Dean of Men at Bluffton this year; a teacher by profession.

Q. Is that a secular or religious college where you are teaching? A. It is a Christian college.

Q. Supported by any particular Christian faith? A. Yes, the Mennonite faith.

Q. Are you yourself a Mennonite? A. No, I am not.

Q. What faith or church do you belong to? A. I am a Member of the Religious Society of Friends, generally referred to as Quakers.

Q. Are you a Quaker minister? A. There are no Quaker ministers.

Q. You say you are not? A. That is right. Every Quaker is a minister in the tenets of the—

Q. The church does not recognize individuals as ministers of the faith? A. Not professionally.

Q. But the tenets provide that each Member of the Religious Society of Friends is a propagator of the faith, is that right? A. Yes, sir.

Q. If I understand correctly, there are among the Quakers those who are referred to as Birthright Quakers and others who are not Birthright Quakers? A. Yes, sir.

Q. Tell the judge and jury what is the distinction between the two groups of Quakers? A. A Birthright

Quaker is one who is a Member of the Society of Friends because his parents were members. Now a child may or may not be taken into the Society of Friends, but sometimes people do stipulate that their children should automatically become Members. That is a Birthright Friend. A Convinced Friend is one who joins the Society of Friends very much as one would join any other faith.

Q. Do you have a certain age before which no one can join the Quakers as Convinced Members? A. Not that I know of.

Q. Are you a Convinced or Birthright Quaker? A. I am a Convinced Friend.

Q. At what age did you become a Convinced Friend? A. I believe I was eighteen.

Q. Did you at any time ever since you became a Convinced Quaker change your adherence to the faith? A. No, not at all.

Q. Are you a member of any Friends' Meeting? A. Yes, I am a member of the Exeter Monthly Meeting at Reading, Pennsylvania; and I was a member of the State College Meeting last year. Apparently that is a type of membership that does not last. It was only during my stay there.

Q. What do you mean by a Meeting of the Friends? A. A Meeting roughly corresponds to a local congregation. Meeting is used interchangeably. Sometimes it is used as a form of worship. You call a meeting for worship instead of a church service. The meeting I am speaking of now, the term is used as a local congregation. That is the best analogy I can think of.

Q. When in Reading, Pennsylvania, where you were a member, did you frequent the Meeting of the Friends? A. Very recently.

Q. When you were a member of this College Meeting, did you frequent their Meetings? A. Yes, I worked for the Meeting with the young people.

Q. Did you have any particular position with the Meeting? A. Yes, at the Reading Meeting, I was a mem-

ber of the Peace Committee; and at the State College Meeting, I was a part-time secretary, which is a part-time religious worker,—a rough analogy.

Q. Did you before you became a Convinced Member read the literature of the Friends? A. Yes, I had attended the Friends's, first day school, which is Sunday school, for years; and I became interested in high school in the Friends' approach.

Q. Do you know the tenets of the Quakers? A. Yes. I would not want to be grilled on all of them, but I know the basic principles of our Meeting.

Q. You have studied them? A. Yes, thoroughly.

Q. I am going to show you here a document marked Defendant's Exhibit F for identification, and ask you whether you have ever seen it before? A. Yes, I have seen it before.

Q. Where did you see it? A. Well, I had it, I think—I had one like it, at least—I had it in my house. I have more, I believe, at home.

Q. Take a look at the first paragraph of Defendant's Exhibit F, read it, and tell us what that is?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Did you prepare the original of this Defendant's Exhibit F? A. No, sir.

Q. Do you know who prepared it? A. I have no idea.

Q. Do you know whether or not the content of this Defendant's Exhibit F is an exact copy of the Declaration of George Fox and other Friends made to King Charles the Second in 1660; the first paragraph? A. I would assume it was. I have not checked with George Fox's Journal, but it sounds similar to it.

Q. Do you know from your own knowledge whether or not the paragraphs following George Fox's Declaration are an exact copy of the Meeting representing Friends in the United States, adopted at Earlham College, Richmond, Indiana, on July 20 to 22, 1948? A. I was not at that Meeting, and it might be an abridgment; but I am sure it is authentic since it came from sources—

Q. Do you recall that part of the Declaration of George Fox and others which pertains to the Quaker faith with reference to war and peace? A. I could give you the gist of it.

Q. Will you do so?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you believe in the tenets of the Quakers as they pertain to war and peace?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you follow in theory and practice the tenets of the Quakers as they pertain to peace and war?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you know whether or not you are a Christian in your practice?

Question read.

Mr. Openlander: Objection.

The Court: He may answer.

A. I try to be. I cannot judge that.

Q. Do you follow certain precepts with reference to war and peace? Just answer yes or no.

Mr. Openlander: I have no objection.

A. Yes, sir.

Q. What is that precept?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you know anything about the people in this country who refer to themselves and others refer to them as Peacemakers? A. Yes, sir.

Q. Who are they?

Mr. Openlander: Objection.

The Court: Has that been brought out in the trial in any document?

Mr. Heisler: Oh yes, Your Honor, Government's Exhibit 3.

The Court: He may answer.

A. Peacemakers is an informal movement, including many, notably, Christian ministers in this country who believe that wars are wrong, and that especially are wars wrong in our age, and really a form of race suicide. They advocate certain basic forms of action to counteract the trends towards war in our country and in other countries. Among them, these tenets, is that Peacemakers believe that one should have a very strong spiritual basis for his pacifism; and that people of conviction, conscientious scruples against registration for the draft, have a right and a duty to refuse to register; and Peacemakers will support people who refuse to do this on Christian grounds. They also believe that it is wrong to participate in other forms of war, such as buying war bonds, going into the army, &c.

Q. Did you ever declare your adherence to the beliefs, to the principles, of Peacemakers? A. Yes, I did.

Q. Did you ever tell to any government official or agent that you did so? A. Yes, I told Mr. Tootell and Mr. Stickle, I think specifically, that I did.

Q. Did you ever write any articles or books or newspaper stories expressing your own belief with reference to peace and war? A. Yes, letters, one article; no books.

Q. Did you ever preach to any congregation or meeting in which you expressed your beliefs as far as war and peace are concerned? A. Yes, sir.

Q. Would it be fair to state that the opinions that you expressed or believed that you expressed were in line with the principles of the Peacemakers, as you just now described?

Mr. Openlander: Objection. It is leading.

The Court: He may answer yes or no.

A. Yes, sir.

Q. Calling your attention to the indictment returned against you, and further calling your attention to Charles Rickert, will you please tell the judge and jury when was the first time that you met Charles Rickert? A. You mean that I knew that he was Charles Rickert, or the first time I spoke to him?

Q. When was the first time that you knew that young man was Charles Rickert? A. Well, it was approximately the 20th of September, I would say.

Q. Tell us the circumstances under which you learned that he was Charles Rickert? A. Yes. I had learned that there was a non-registrant on Bluffton Campus, and I had learned that the name of the non-registrant was Charles Rickert. Now Charles had been a master of ceremonies at a college mixer, and I was a new teacher, so he introduced me, and his name was pointed out. So I knew Charles when I saw him, but I never had been introduced or met him. I went to Charles' room. I was Dean of Men, and I believe I asked his room-mate whether he would tell Charles to see me. I went on with my duties, and Charles came in to see me. I told him that I heard a conscientious objector on Bluffton Campus had refused to register; that it was pointed out in a recent newspaper article that there was such a non-registrant in the vicinity; and that he might be the one. He said, "Yes, I refused to register." I congratulated him and told him that I too would refuse to register; that I had refused to register in the last war; and that we were interested in his position.

I did not say much more at that meeting because time was pressing; I did not know Charles; and I wanted to find out more about him before I would make any other identification at that point.

Q. The newspaper article you referred to, that there was a conscientious objector who refused to register: did that article mention the name of that non-registrant? A. No, it did not.

Q. I am showing you here Defendant's Exhibit G, and ask you whether or not that is the newspaper article that you referred to? A. Yes, that is it.

Q. That was all the conversation that you had with Charles on the 20th of September, as far as you recall? A. I probably told him good luck, as he left; something to that effect. I don't recall. That was the import of it.

Q. Did he tell you at that time on or about September 20 the date when he refused to register? A. Yes, that

is right. I asked him when he had decided to refuse to register.

Q. What did he say? A. He said it was early in the summer; and he dated that by the fact that he wrote a letter to his father, on Father's Day, which was in the neighborhood of the passage of the Selective Service Act. I remember that very distinctly. He told him at that time he probably would not register. That was the general gist of it.

Q. Did he tell you whether or not he informed in fact his draft board that he is then and there refusing to register? A. Yes, he told me that. I am not sure whether it was on that occasion.

Q. Did you talk to Charles after the 20th of September concerning his non-registration? A. Yes, sir.

Q. How often? A. It is difficult to say because I talked to him about many other things too.

Q. Forget other things: tell us approximately how many times you talked to him between September 20th and November 8th about his non-registration? A. Oh perhaps, I should say approximately every other day I mentioned it to him.

Q. Tell us everything that you recall now what you told Charles Rickert about his non-registration, and what he told you during these conversations? Probably there will be no objection if you do not give us dates; but give us all these conversations put together. Tell us everything you remember you said about his non-registration? A. Much that I told him concerned the type of future in store for him if he was convicted. He was curious about that. So we can end that. A lot about prison routine and food and that sort of thing. Frequently it was merely a question of asking, "Has the government done anything or made a move"; so it was merely inquiries. A great percentage of these were inquiries. I would say we may have had prolonged conversations once a week, approximately.

He was also interested in the Friends. So we spoke quite a bit about the Friends. He was interested in Peacemakers. He knew about Peacemakers, and asked me for

a copy of the call to the three hundred ministers, and I gave him a copy of that.

Q. When you say gave him a copy, it would be a copy of the document marked Government's Exhibit 3. Is that the document that you refer to (shown witness)? A. Yes, sir.

Q. What else was said? A. I did not know Charles too well—

Mr. Openlander: I do not object so long as he confines himself to what was said.

Question read.

A. I told him that we supported him; my wife and I agreed with him; we would also refuse to register for this draft if we were asked to do so; and we wanted as much as possible to identify ourselves with the men who were going to prison because our immunity rested with our age. I told him if at any point he felt his conscience directed him towards other actions, he should feel free to undertake another course of action.

Q. What did you mean by that?

Mr. Openlander: Objection.

The Court: Just say what the conversation was.

Q. Did you discuss anything further about that phrase you just now used? A. I believe I told him that several times, because I was afraid my presence might influence him beyond his conscience if he were not clear; and I wanted to make sure he was clear.

Q. What did you tell him? A. I told him he knew he was perfectly free to change his course of action if his conscience directed another course.

Q. You said he was asking you questions about the Quakers: what kind of questions did he ask you?

Mr. Openlander: Objection.

The Court: Sustain the objection to that.

Q. May I ask you whether or not during the conversation you had you told him about the tenets of the Quakers pertaining to war and peace and one's conscience? A. He had known those.

Q. Did he repeat them to you? A. I believe—we discussed them, yes.

Q. Did you tell just about everything said during the period of September 20th and November 8th between you and Charles Rickert concerning his non-registration? A. With Mr. Rickert, yes, I believe.

Q. Calling your attention to the 8th day of November, 1948, do you recall that date? A. Very well.

Q. Do you recall meeting on that date a gentleman by the name of Mr. Tootell? A. Yes, I do.

Q. Where did you meet him? A. In Ropp Hall, right inside the doorway.

Q. As well as you remember, tell us what happened from the time that Mr. Tootell, alone or accompanied by some one, accosted you or you met him, and what was said and by whom until you departed or he departed? A. Mr. Tootell was with another man, Mr. Fairall, and when he came in the door, I asked him questions about his presence; and I believe I finally learned he was an F. B. I. man—I suspected that—or a marshal or something of that sort. I asked Mr. Tootell, I believe, "Have you come for Mr. Rickert?" He said, "Yes," Then I said, "If you take Charles, you will have to take my wife and me because we advocate the same position, and we would do the same thing."

There was not much conversation at that point. Mr. Tootell asked where Charles' room was. I believe I said it was upstairs. He and Mr. Fairall started going up the stairs. I went up the other stairs. There are two stairways in Ropp Hall, at both ends. I went up the other stairs and looked for Charles. He was in the lavatory. I told him that they had come for him, or words to that effect. I went with him into the room where he stayed. Mr. Tootell and Mr. Fairall came in.

Mr. Tootell identified himself and asked routine questions of Charles about registration, &c. Then I asked Mr. Tootell if he had a warrant. As far as I can remember, Mr. Tootell told me, in other words, of this effect: it was

none of my business. He said to me, "Did you tell Rickert not to register?" I said, "No. I am sorry I never had the opportunity to do that."

And then I believe Mr. Tootell brought up the question of why I said, "You should take us." I believe he mentioned that I had said I advocated the position; and I am sure he asked me, "When did you advocate the position?" I told him in a speech in Reading, Pennsylvania, last summer.

Then there was not much more conversation—yes—there was one other point. Mr. Tootell said, "You are Dean of Men: and you take this position?" I remember distinctly saying, "Yes, this is a Christian college."

Mr. Tootell and Mr. Fairall took Charles downstairs, and my wife and I both gave words of support to him at that point as he left.

Q. What did you say? A. As near as I can recall, I said, "Charles, do not let them coerce you into changing your conscience"; "your mind," it may have been; I don't know exactly.

Q. That was practically all the conversation you had at that time with these gentlemen, Mr. Tootell and Mr. Fairall? A. So far as I can recall.

Q. Will you go now into the occurrences of November 15, 1948: I mean the occurrence where Mr. Tootell and Mr. Stickle were present? Where was that? What time of day? A. That was in Ropp Hall, in our apartment. It was after my four o'clock class; approximately four-ten to six something; I don't know.

Q. Who were present? A. Mr. Tootell, Mr. Stickle and my wife and myself.

Q. The gentlemen came into the apartment or room there, is that right? A. We invited them in the room. They wanted a place to talk.

Q. Tell us about how long did they remain in your apartment? A. Oh, I would say approximately two hours, two and one-half hours.

Q. And they were sitting around there at the table with you? A. Yes, sir.

Q. Tell us now, as far as you can remember at this day, what was said, by whom, and what was asked? A. A lot was said.

Q. You understand we are trying to refer only to the matters pertinent to the issues, namely, your counseling or not counseling, aiding or not aiding, or abetting or not abetting, Charles Rickert. What was the gist of the conversation? Tell us everything you can remember? A. Well, I gave a lot of material on my general pacifist background convictions. I brought out the fact that I had been in prison for my ideals; that I believed these things. And then there were specifics; I suppose that is what you want?

Q. During that time did you tell Mr. Tootell that your pacifist conviction is based on the Declaration of George Fox and others of Friends? A. I told him I was a Member of the Society of Friends, and held to their doctrines.

Q. Did you tell him you believed and followed the tenets? A. Yes, sir.

Q. Go on? A. I was asked by Mr. Tootell whether I had said, when he came to Ropp Hall, that "We told Charles not register."

Q. When he came on the 8th of November? A. Yes, and I said, "No, I did not say that because I could not have done that." I had not known Charles as an individual at that time. I had not met him formally—well—I spoke with him informally.

Then he pressed me on that, and said "Are you sure you did not say that in the heat of the excitement?" I said, "I am sure I did not say that; but if I had said it, it would not have been true; it could not have been true."

Mr. Stickle questioned me at length about my position, and I emphasized very definitey the fact that I believed in non-registration; I will identify myself with non-registrants who are inwardly prepared to take the position; that I will attempt to support men of conscience, even though they go against the governmental decrees, as will the three hundred other ministers and the Quakers and many other groups.

I pointed out that I put much emphasis on this business of inward preparedness. Mr. Tootell asked me whether at any point I had taken aside young men in the dormitory and asked them to refuse to register; and I made it clear that that was not my procedure, but that if any young man whom I knew well enough to judge his clarity and position would come to me and assure me he believed in non-registration, I would support him and identify myself with him as much as possible.

We talked at length about my activities as a pacifist; whether I had written or spoken to groups; and I mentioned the Reading speech and some speeches I had made in Bluffton; not concerning non-registration; they were other matters.

Q. Anything else said? A. Yes. My wife was questioned concerning her activities and her being a Peacemaker, &c.,; and a statement was drawn up by Mr. Tootell.

Q. I am going to show you here Government Exhibit 2-A and 2-B, and ask you whether or not that is the document that you referred to? A. I believe it is, yes.

Q. Tell us what was said to you about this paper by Mr. Tootell, and what did you say? A. It was explained by Mr. Tootell that in signing this paper, it might be used as evidence in court. He asked me whether I would sign it. I believe it was Mr. Tootell. It may have been Mr. Stickle. It was one of them; perhaps both. And I said I would want to speak with my wife about that first.

So I took the statement to the kitchen, which is another room, and called my wife. We looked over the statement and decided not to sign it. We told Mr. Tootell that we would not sign any statement at that time. We in our discussion felt—I don't know whether I said this to Mr. Tootell, but said it to my wife—we did not like the tone of the statement. We did not like its emphasis. We wanted time to think it over.

I also told Mr. Tootell I felt that if I was prosecuted for this, then, in all justice, the three hundred ministers who signed that statement should be prosecuted, because they do exactly the same thing I do.

Q. When you said that, did you have in your hand, or did Mr. Tootell have in his hand, Government's Exhibit No. 3? A. I don't remember whether he had it or I had it.

Q. Did you point out to Mr. Tootell the names of the three hundred ministers who signed this Exhibit 3? A. I believe I called attention to one or two.

Q. Did you point out to Mr. Tootell or Mr. Stickle any part of Exhibit 3 (handing it to witness)? You can see whether or not you did? A. Yes, sir.

Q. What was the part that you pointed out to Mr. Tootell? A. As I recall, I pointed out this first part, about registration.

Q. Arabic numeral No. 1, that is, on Page 3? A. No. 1 on Page 3.

Q. That is the exact paragraph Mr. Tootell testified to you pointed out to him? A. That is right.

Q. And when you say you pointed it out to him, what did you do, read it to him or ask him to read it? A. I don't recall. I believe I read a section of it to him.

Q. Will you read that section that you read to Mr. Tootell at that time? A. Yes:

"For young men we believe breaking with war means refusal to enlist in the armed forces; withdrawal from armed forces for those now in them; refusal to register or render any service under a conscription act."

Q. What did Mr. Tootell say to that, if anything? A. I don't recall. I said I felt that Rickert should not have been imprisoned for his act. Mr. Tootell pointed out that this was a violation of law, and he had to be imprisoned. Then I pointed out that many men had refused to register in the last war, who were of note and fame, an over-age group, and they were not prosecuted; so the government did not have to prosecute all non-registrants.

Q. Did you mention any names of any of those people who refused to register, for Mr. Tootell? A. Yes, I mentioned A. J. Muste, and I believe I mentioned Evan Thomas.

Q. Do you recall what Mr. Tootell has said, if anything, when you told him that if you are to be prosecuted,

the three hundred ministers signing Exhibit 3 also should be prosecuted? A. I believe he said that was not his job; prosecution was not his job; he was an investigator; words to that effect.

Q. What, if anything, was done with Exhibit 3 during this conversation? A. I gave a copy to these gentlemen and they took it along. I gave them another document also, a letter that I had written to President Truman in March, telling why I would not register if there were a draft act passed.

Q. Did he take that document? A. Yes, sir.

Q. I wonder whether you have that document in your possession? A. Yes, I have.

Q. I am going to show you what is marked Defendant's Exhibit H, and I ask you whether or not this is the document that you handed to Mr. Tootell or Mr. Stickle at the time of their interview with you on November 15? A. It is a copy of it or it is the same one.

Q. Did you tell them what this document was? A. Yes, I said it helped explain how I felt about registration.

Q. As to Exhibit 3, when you handed it to Mr. Tootell, what did you tell him?

Mr. Openlander: I think he has gone into that. I think that is Government's Exhibit 3.

The Court: Yes, he has offered that, Mr. Heisler.

Q. I am showing you here Defendant's Exhibit I, and ask you whether or not that is an exact copy of the Exhibit 3 as you handed it to Mr. Tootell? A. Yes, it is.

Q. I show you here what is marked Exhibit 3-A, and ask you to take a look at it, whether or not that is the document as you handed it to Mr. Tootell, or is it in a changed condition?

Mr. Openlander: That was admitted. Of course it is changed.

A. It is changed.

Q. But Exhibit I is the exact copy as you handed it to Mr. Tootell? A. Yes, sir.

Mr. Heisler: At this time defendant offers Defendant's Exhibits heretofore identified as F, G, H and I.

The Court: What is F?

Mr. Heisler: F, Your Honor, is a mimeographed sheet. The heading is, "Advices on Conscription and "War," containing one paragraph what is designated as George Fox, and there is there a Declaration presented to Charles the Second in 1660, underneath.

Mr. Openlander: Objection to this statement. You might as well read it to the jury.

Mr. Heisler: I want to hand it to the court. The court asked me.

(Document shown court.)

Mr. Openlander: Objection to that exhibit, Your Honor.

The Court: The objection will be sustained to Exhibit F.

Mr. Heisler: Exception. I am offering now Exhibit G.

Mr. Openlander: It may be admitted without objection as far as the government is concerned.

The Court: Without objection it will be admitted.

Mr. Openlander: Objection to Exhibit H which is being offered. It is not material.

Mr. Heisler: May I point out this document, as testified to by the defendant here, was handed by him to the government agent, with the remark that to explain his position better he gives him this copy. I obtained it because of the kindness of Mr. Openlander from his files.

The Court: Referring now to H?

Mr. Heisler: Yes. That is a copy of the letter that the defendant says he wrote to President Truman.

The Court: The objection to that will be sustained.

Mr. Heisler: And I am offering Defendant's Exhibit I in its totality.

The Court: The objection to that will be sustained. That has already been objected to by both sides, and sustained each time by the court.

Mr. Openlander: I believe this Exhibit 3 or 3-A is now in, which omits names which are part of that.

Mr. Heisler: Just to have the record clearly indicate, I should like to state our objection is an elementary one, namely, no government agency can offer it in evidence and cut it in pieces. We do not object to the document itself; we welcome it into evidence; we feel they cannot go out and tear it to pieces and then offer whatever they consider proper. Therefore we object. The whole document should be included.

The Court: Is that Defendant's Exhibit C?

Mr. Heisler: That is 3.

The Court: The same as Exhibit 3?

Mr. Heisler: Yes, Your Honor.

The Court: You are offering Exhibit 3 now?

Mr. Heisler: Oh no; we object to that mutilated part. We are offering the full, which is Defendant's Exhibit I.

The Court: It is the same as 3.

Mr. Heisler: I understood government counsel wanted to withdraw 3, and wanted to substitute 3-A in lieu thereof.

The Court: To that you object?

Mr. Heisler: To this mutilated exhibit I object.

The Court: The objection will be sustained.

Mr. Heisler: Now I would like to offer our Exhibit I, which is exactly the same as Exhibit 3.

The Court: The objection to that will be sustained.

Q. When you were talking to Mr. Tootell and you handed to him—when you talked to him about Peacemakers, and about these three hundred Christian ministers who signed the Open Letter, did you tell him in your own words anything else in addition to reading this paragraph one thereof, as you said you did? A. I explained I felt the draft law was an immoral law; that people have an obligation to break immoral laws if they are convinced of their immorality. I probably made analogies from American history, but I am not clear on that.

Q. What do you remember about your analogies that you made?

Mr. Openlander: He just said he did not remember. Object.

The Court: Sustain the objection.

Q. What else did you tell him with respect to your position as to the draft law? A. I explained I never

advised people to take a conscientious objector position indiscriminately; that I was very careful to emphasize that people should know what they are doing; that they should be willing to pay a penalty; and that a conscientious objector, like a soldier, if needs be, be willing to die for his faith. I pointed out that I had emphasized that in all my activities: men need to be prepared for the position they were taking, because the government puts so much pressure on people who took such position that it would not only be wrong but foolish to do this.

I furthermore pointed out that I had not advocated this position for other reasons, at Bluffton included. Among those was the fact that Bluffton was not in exact harmony with my emphasis on registration; that I did not believe, as a new person in the community, I could go around selling my ideas and that sort of thing.

Q. You were present when Mr. Stickle testified yesterday? A. Yes, sir.

Q. Did you hear him say the following and I am quoting from the transcript: "Mr. Gara told us that he did not go about broadcasting counsel to refuse to register"? A. Yes, sir.

Q. "He said that his personal belief impelled him to support any one who adopted the attitude of non-registration"?

Mr. Openlander: Objection to that. That is exactly what Mr. Gara testified to, I think in the preceding question. Now he is reading what some one else said, and asking if that is not right, and Mr. Gara is going to say yes.

The Court: Get on with the examination, Mr. Heisler.

Q. Did you explain to Mr. Tootell and Mr. Stickle what you meant by that, that you were watching whether or not a person is prepared to take the position?

Mr. Openlander: Objection. I believe we have gone into that.

The Court: Sustained.

Q. Did Mr. Tootell ask you what you mean by that, being prepared? A. No. Mr. Stickle and I spoke about that, mostly.

Q. And you explained what you meant by it? A. Yes, sir.

Q. Mr. Stickle and Mr. Tootell were side by side during this conversation? A. They were in the same room, yes.

Q. How far were they apart? A. Perhaps as far as I am from the clerk.

Q. Was it possible for Mr. Tootell to be present and not to hear when you told Mr. Stickle that you talked to people if they were inwardly prepared, or that they were prepared?

Mr. Openlander: Objection.

The Court: Sustained.

Q. Do you know from your own knowledge whether or not Mr. Tootell heard it when you said that you were talking to people who were inwardly and morally prepared?

Mr. Openlander: How could this man know of his own knowledge whether Stickle heard something or Tootell heard something?

Mr. Heisler: Usually in conversation we know what other people hear about our conversation.

Mr. Openlander: I will not object if you feel you can drag it out of him.

The Court: You have brought out that a conversation was had and where the gentlemen were. That is sufficient.

Q. You have said that Mr. Tootell was from you about as far as Mr. Lennon, the court reporter, which would probably be six feet or thereabouts. How far was Mr. Stickle from you at the same time during the conversation? A. About the same distance—closer—Mr. Stickle I think was closer.

Q. Did Mr. Tootell ever tell you during this two and one-half hours' conversation that he could not understand, could not hear what you said?

Mr. Openlander: Objection.

The Court: Sustained.

Q. The conversation was carried on in a normal tone? A. Yes, sir.

Q. Do you recall during the second conversation whether or not Mr. Tootell asked you if you know that Charles Rickert ever wavered in his position not to register? Yes or no, do you recall that? A. Yes, sir.

Q. Do you remember what his words were, Mr. Tootell's? A. The substance of them was: "Did Charles at any time feel that he should not go on or continue in his stand, and did you argue with him at those points"?

Q. What was your answer? A. "As far as I know, there was no question in Charles' mind at any point."

Q. That was your answer to Mr. Tootell? A. Yes, sir.

Q. And as to his question as to whether you ever argued with him about it, what was your answer? A. I never argued with him about it. I do not believe I bothered answering that. I was not aware of any time that he wavered.

Q. You told that to Mr. Tootell? A. Yes, that there was never a question in my mind.

Mr. Heisler: Your witness.

CROSS EXAMINATION

By Mr. Openlander:

Q. Mr. Gara, as soon as you found out that there was a student at Bluffton College who had not registered for the selective service and had refused to obey the law—

Mr. Heisler: Objection to that question. I think that is a conclusion.

Mr. Openlander: Let me finish first, please.

Mr. Heisler: All right.

Q. —I take it from your testimony that you were anxious to meet him, is that right?

Mr. Ohlinger: Objection to that.

The Court: Yes, you may reframe that question.

Q. As soon as you found out there was a student at Bluffton College that had refused to comply with the provisions of the Selective Service Act by not registering, you were anxious to get in touch with him?

Mr. Ohlinger: Objection.

The Court: Overruled. It is cross examination.

A. Yes, sir.

(Recess.)

Q. Mr. Gara, just before the noon recess, I believe I asked you a question as to whether or not, when you learned that there was a student at Bluffton College who had refused to register in accordance with the Act, you had not made an effort to get in touch with him, and I believe your answer was yes. That is right? A. That is correct.

Q. Why were you anxious to get in touch with this student? A. I was anxious to get in touch with him because I was interested in supporting non-registrants who were conscientiously opposed to conscription. I knew there would be many such, and was interested in giving my support and identification to such people.

Q. In other words I assume what you mean is that you wanted to get acquainted with him and tell him you supported his views? A. I also wanted to find out what his views were. I might not have supported him if it had been done on some different basis.

Q. Is it fair for me to say that so long as the registrant's views coincided with yours, you were perfectly willing to do anything you could to help him? A. What do you mean by help him?

Q. Let us put it another way. So long as registrant's views coincided with yours, you were anxious to let him know you were with him in his stand? Is that a fair statement? A. If I felt he was inwardly prepared for the position.

Q. So long as he conscientiously felt that, then you were willing to let him know about your feelings? A. That is right.

Q. What else was in your mind at that time in that connection? How far would that lead you to go with him?

Mr. Heisler: Objection.

Mr. Openlander: I have a right to inquire as to intent.

Mr. Ohlinger: I think that is entirely out of the issues in this case, how far he might go.

Mr. Openlander: I want to know what was in this man's mind, and I am asking him what was in his mind.

A. What do you mean, how far would I go? I will say how far I would not go.

Q. No, I should like to have you tell me what you would do to support such a man, after you had found him, a man such as Rickert? A. Well, I did—

Q. Go ahead? A. —tell him about other conscientious objectors; about the tradition of conscientious objectors, which he already knew.

Q. About the tradition? A. Yes, about prison, about bail, the technicalities of arrest, &c. I was anxious that he strengthen his prayer life, his inward preparedness; and that he knew what he was doing. I questioned him about that. I was anxious that he knew the stand he was taking, and was sure of himself.

Q. Why were you anxious that he know those things, that is, know about prison life, and know those other things you talked about? A. I feel it is very tragic if people do things which are not really an inner urge, and if it is in the nature of defiance of compulsion which will bring the onus of society upon their heads, because if it is a mere whim or mere suggestion taken at some one else's request, it will not stand up; it will not be in the best interests of the things I believe.

Q. You wanted to prepare him for what might come to him in the event he persisted in his refusal, is that it? A. No, I wanted to find out if he was prepared for what might come.

Q. You have been talking about before you met him and your object in meeting him? A. Yes, sir.

Q. Let us take later on; after you found out and felt in your own mind that he was convinced, was it your thought that by your conversations you would prepare him to, let us say, stand this ordeal? A. He and his family.

Q. Then I believe you said after the first meeting you had with Charles, and I believe you fixed the time of that first meeting as some time around the 20th of September; that after you talked with him, and as I wrote it down, I believe you said, "I talked to Charles after September 20th about his nonregistration about every other day"; is that right? A. I pointed out that much of that was mere questioning, and I included that, yes.

Q. Sometimes you would just say, "Has the government done anything"? Or, "Has the government moved"? A. Yes, sir.

Q. I believe you said probably once a week or thereabouts, let us say five to seven days, you would have a more extended conversation with him; is that right? A. Yes, sir.

Q. In these, I believe you called them, prolonged conversations you had about once a week, what would you discuss in those prolonged conversations? A. We discussed mostly the news of other conscientious objectors that we had received.

Q. Who would start this discussion of these other conscientious objectors? A. Sometimes he would and sometimes I would.

Q. Could you give the jury some idea about how these conversations would go, what you would say about the other conscientious objectors? A. Well, I might say that "There was a conscientious objector sentenced in a Philadelphia Court today." —or some other court to-day—"Did you see that?" Or he might say that to me, and I would say yes.

Q. Would there be any further discussion? A. There might be.

Q. Can you give us any idea what turn that conversation might take? A. Yes, we might discuss why the government would choose a few conscientious objectors, and choose not to prosecute all of them.

Q. You would give him your idea about that subject of the government picking out just a few? A. Yes, sir.

Q. Tell him what you thought about it? A. Sometimes; and he would tell me what he thought.

Q. Anything else that you can recall that would go on in these conversations, other than comment upon the fact that certain conscientious objectors had been sentenced? A. He had some correspondence with other conscientious objectors, which he shared with me.

Q. Did you have some correspondence with some other conscientious objectors? A. Yes, sir.

Q. Would you share that with him? A. Yes, sir.

Q. What do you mean by sharing correspondence? A. I mean he would read it or I would read it.

Q. That is, if you received a letter from a young man who was a conscientious objector, you would show that letter to him; is that right? A. Possibly.

Q. Or read it to him, or part of it? A. Or I might give it to his room-mate, and he would give it to him; anything of mutual interest.

Q. What do you mean by mutual interest? How was that of mutual interest? A. Because we were interested in conscientious objection and the government's treatment of conscientious objectors.

Q. You were interested in seeing, I take it, that he had such information as came to you along that line? A. And that I had such information as came to him.

Q. In other words you would exchange information? A. Yes, sir.

Q. Do you think Mr. Rickert gained any comfort or consolation from those letters? A. I don't know. You will have to ask Mr. Rickert.

Q. Was it your idea at the time that he would?

Mr. Ohlinger: Well, I don't think that is proper.

Mr. Openlander: It definitely is proper, again, Your Honor.

Mr. Ohlinger: Objection to it.

A. Please repeat the question.

Q. Was it your idea that by interchange of letters and interchange of ideas he would gain some consolation

and some comfort? A. I am not primarily interested in consolation or comfort, no.

Q. I appreciate the fact that you were not primarily concerned with that; but I think we would all like to know whether, when you shared these confidences with Mr. Rickert, and when you discussed these various letters that might have come to him or might have come to you, and when you talked them over, whether that was with the idea of further preparing him for imprisonment that you felt might come to him because of his refusal to obey the provisions of the selective service law? A. I would say not fundamentally; it was more an exchange of ideas the same as I exchange ideas with fellow historians.

Q. Did that idea enter into it to any extent at all? A. I would say it did enter into it to some extent.

Q. I think that would be logical that you talk it over. I assume you got pretty close and friendly with Rickert, did you not, at this time? A. And his room-mate.

Q. Getting back to your testimony on direct examination, I believe that you said that very shortly after you met Mr. Rickert, you told him that "We"—meaning yourself and wife —"supported him and agreed with him, and you would also refuse to register"; and that you wanted to identify yourselves with those men who were going to prison—I tried to copy down your words as you testified —is that a fair statement? A. By men going to prison: many men go to prison: I mean those Christian conscientious objectors.

Q. Was Rickert in any of your classes? A. Yes, in one class.

Q. What do you teach down there? A. Government and History.

Q. That is a course in Civil Government? A. Survey in American Government, and History Courses.

Q. Is it Modern History or Ancient History? A. Whatever we happen to offer at the time.

Q. What course are you teaching now in History? A. Teaching the second half of United States History. That is not only History. Do you want the others?

Q. You mean you teach others? A. Yes, I teach five courses.

Q. Go ahead? A. I teach a course in International Organization, which is the United Nations primarily. I teach a course in Political Theories. I teach a course in European History, Early European History.

Q. I believe you said—and again I tried to copy your exact words—in speaking of Rickert you said that you sought to impress upon his mind that he was free to change his mind if his conscience so dictated? A. That is right.

Q. You said that? A. Yes, sir.

Q. What did you mean by that when you said that you made it clear to him that he was free to change his mind if his conscience so dictated? A. I meant that the fact that I took this position and my wife took this position should not push him into continuing if at any moment he was not convinced he should continue, inwardly; because I did not know Charles Rickert as well as I know him now, and I was not sure whether he was as inwardly prepared as I am now that he is.

Q. When you gave him the assurance that he could change his mind, did you do that on more than one occasion that he was free to change his mind? A. He laughed at that time and said, "I know that of course." And it was understood.

Q. In other words you only said that once? A. I may have said it more than once. I believe I said it twice.

Q. When you told him he could consider that he was free to change his mind, did you perhaps feel that because you were a professor down there at the university, a professor in one of his classes, it might perhaps be somewhat embarrassing for him to change his mind? A. I never thought of it.

Q. And for that reason you wanted to assure him that if he wanted to change his mind, he should consider he was under no obligation to you or any one else; and that he should go ahead? A. It was not in the professorial role I thought of that, no.

Q. Why did you consider it necessary to tell him that he was free to change his mind? A. I wanted it clear to him if there was any question in his mind. Apparently there was not.

Q. What? A. That he might not feel conscientiously convinced. I did not know Mr. Rickert that well.

Q. I understand that; but why did you feel it was necessary for you to say to him, "Now, Rickert, I want you to feel free to change your mind about this"? A. I told you what was behind that, primarily. I have seen so many people cracking up when they take positions for which they are not ready. I have seen the prison system break conscientious objectors who were not prepared to take what they had to offer. So I am very careful that the prison system and government do not break them. I do not want people who hold a position to be broken. I do not believe if you really hold a position, you can be broken. I wanted to make sure in this particular case he realized the consequences were heavy, because I had seen men become embittered.

Q. I still do not understand why it was necessary for you to say to him, "Now, Rickert, I want you to feel free to do this. I want you to feel free to depart from this stand that you have taken"? A. I have told you why.

Mr. Heisler: Objection. I think the question has been answered quite extensively.

Mr. Openlander: He is talking about breaking a prison system.

Q. Why should you assure him that, so far as you personally are concerned, that he is free to change his mind? A. I explained that.

Q. Perhaps I did not get it. Would you mind explaining again why you felt it was incumbent upon you to say to him, "Now, Rickert, you are free at any time to change your mind" or words to that effect? A. I believe in the position I am, my very presence on the campus might have influenced him, if I had said nothing to him.

The fact that I was in prison might have influenced him. In fact people are influenced by the very fact that men are in prison.

Q. As a matter of fact you realized, did you not, that the fact that you had discussed this with him on several occasions, and exchanged your ideas, as you have told us, might also have influenced him; is that true, too? A. No, I don't believe that was in the picture.

Q. You mean you feel he might be influenced by the fact you were on the campus, and the fact that you had served time for one of these violations; and with that you want us to understand that that is the reason you told him he should feel free to change his mind, is that it, rather than the fact you had had these intimate conversations you have told us about? A. Yes, sir.

Q. When you were talking about Mr. Tootell's visit, you told us that you met them on the first floor, and that you hurried up the back stairs; that is right, is it not? A. That is right.

Q. Why did you hurry up the back stairs? A. I don't know. I wanted to tell him they had come for him.

Q. Why did you feel it was incumbent upon you to hurry up the back stairs to give him that message? A. I wanted to identify myself with him in the eyes of the government.

Q. I take it from that another way of saying it is that you wanted to give him some consolation at a time when you felt perhaps consolation might be necessary; is that a fair statement? A. I wanted him to know that I stood with him all of the way, as my wife did.

Q. And that you were willing to do anything you could to encourage him; is that a fair statement? A. No; that might be something immoral, for all I know.

Q. You knew the only charge against him was a violation of the Selective Service Act? A. You said anything I could do to encourage him. Helping a man does not mean encouraging him in something which would be immoral.

Q. You wanted to do any moral thing to encourage him that you could at that time; is that a fair statement?

A. To identify myself with him.

Q. By identify do you mean you wanted him to understand that you were with him? A. What do you mean by that?

Q. With him in his resolution not to register or comply with the provisions of the Act? A. If he was inwardly prepared, as he was, yes.

Q. I take it at that time you knew or were satisfied in your own mind that he was inwardly prepared, as you call it? A. Yes. Further, I went up there because I wanted to protest to the government this taking of young men to prison. I wanted to let the government know I believed it was wrong. I believe if one man is taken to prison who has a conscience, all men should be taken to prison who have a conscience; and that we should do all we can to prevent pulling a few young people out of these places, out of their homes, away from loved ones, and allowing the government to choose and pick, and not prosecute all violations.

Q. I am curious about something, Mr. Gara, since you have said that. Do you know any one in the northwestern part of Ohio who was supposed to register for the Selective Service Act that has not done so?

Mr. Heisler: Objection to the question. Do you want us to present you with some one?

Mr. Openlander: This man is complaining about the fact we have not got the others.

Mr. Heisler: No, he is not complaining. He is complaining about the arrest. That is the distinction.

Mr. Openlander: I understood he is complaining about the fact that all of them are not being picked up. A. I am complaining about any one being picked up.

Q. You are complaining any time that any one is picked up for a violation of the Selective Service Act? A. That is right. You said for a violation of the selective service law; I modify that—a conscientious violation of the selective service law.

Q. I believe you said during that interview upstairs there, after you went in and after you had done as you

have said for the purpose of aligning yourself with Mr. Rickert, Mr. Tootell or some one asked you whether or not you had counseled Rickert not to register prior to the 10th of September? Is that what you said? A. No. Mr. Tootell asked me, "Did you tell Rickert not to register?"

Q. Then I wrote something down here again, and I am wondering whether this is your answer. You said, "I am sorry I never had the opportunity to tell Mr. Rickert not to register"? A. That was based on the assumption I knew Mr. Rickert was inwardly prepared.

Q. Yes, I believe that is what you testified to; and then I believe you testified some time during that conversation up there, when Tootell and this Deputy Sheriff and you and your wife were there, either during the conversation or at its conclusion, I believe you testified—and I tried to put down your exact words—you gave words of support to Charles, and said, "Charles, do not let them coerce you into changing your mind"? A. My wife and I both said words to that effect.

Q. Your words were, then, I take it, as near as you recall, "Charles, do not let them coerce you into changing your mind"? A. Or "your conscience"; I am not sure.

Q. What did you mean by those words? A. That was primarily for the benefit of Mr. Tootell. I wanted to identify myself with Charles, and wanted to let the government know I fully identified myself with him. That is all.

Q. What did you mean by the words— A. I meant just what I said.

Q. In other words you meant that you wanted—you were telling Charles not to let these government men make him change his mind about registering for the Selective Service Act; is that right?

Mr. Heisler: Objection. The word "coerce" represents something very definite, which ought not to be left out of the question.

Question read.

A. No, that is not right. I said I said it for the benefit, primarily, of Mr. Tootell and his friend, to identify myself with Charles. I certainly would not counsel, if I

would counsel in that direction, in the presence of a government agency. I do not tell people not to register. I said it to strongly identify myself with Charles in the eyes of the government; as many ministers have written to you that they agree with me, and they too should be prosecuted; as my wife said the same thing, and she should be prosecuted.

Q. Let us talk, since you have brought that up: you were there when your wife was interviewed? A. That is right.

Q. Do you remember she was asked by one of these agents as to whether or not she had ever counseled or advised any one to register, and that she said that she had not? A. I don't remember the word "counsel" or "advise." It may have been; I don't remember.

Q. Do you remember that a statement was taken from her, that she, like yourself, refused to sign? A. I remember Mr. Tootell wrote a statement about her; but I also remember that I was asked whether I had told any one to refuse to register, and I, too, said no.

Q. Do you remember if your wife said she signed a copy of this Exhibit 3, this Peacemakers letter? A. No, I don't remember. I believe she said she signed the other letters, that went into you for example.

Q. That is her statement (presenting paper)? A. No, it is Mr. Tootell's.

Mr. Heisler: Objection. That is not in evidence. It is not even identified. It is not material.

The Court: Sustain the objection.

Q. You are familiar with the fact that a statement was taken from your wife?

Mr. Heisler: Objection.

The Court: Sustained. It is not in the case.

Q. You told Charles about the fact that you had been in prison? A. That is right.

Q. I am a little bit confused about that. How many times were you in prison for a violation of the Selective Service Act? A. In prison twice for violating the Selective Service Act.

Mr. Openlander: I am advised by defense counsel they have a witness who desires to catch a train, and I have stated to them that I have no objection to deferring. I have only a few more questions to ask the witness; but if counsel prefer to call the other witness out of turn, it is satisfactory to me.

The Court: Whatever you gentlemen agree on.

Thereupon, the defendant called as a witness,

CECIL THOMAS,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Mr. Heisler: May the record show that this witness takes the stand by agreement, interrupting Mr. Gara's testimony, so that the witness can catch his train.

Q. What is your name, please? A. Cecil Thomas.

Q. Where do you live? A. 259 West Lane Avenue, Columbus, Ohio.

Q. What church do you belong to? A. Both Methodist and Quakers. I give each a small contribution each year. I was a Methodist and now I belong to both, and I have worked most of my life for the congregation.

Q. Have you held any position with any church organization in Ohio? A. Yes, I am chairman of our Committee of the Friends' Meeting in Columbus, Ohio. I am a member of the Represented Friends on the Public Affairs Committee of the Ohio Council of Churches, representing forty-five hundred ministers of the State of Ohio. I was a teacher of a sunday school in a rural parish in Fayette County. I have held a number of positions. There is no time enumerated for I have been a church member all my life.

Q. Were you present recently at a meeting of the Ohio Pastors' Convention which was held in Columbus, Ohio? A. Yes, I was.

Q. Do you recall when it was? A. Yes, January 28th to February 3rd.

Thereupon, there was an inaudible conversation between court and counsel.

Q. I am going to show you, Mr. Thomas, what is marked Defendant's Exhibit J for identification, and ask you whether or not you have seen this or a copy of this document before?

The Court: You may answer yes or no.

A. Yes, sir.

Q. Do you know what this document is? A. Yes, sir.

Q. What is it?

Mr. Openlander: Objection. It speaks for itself.

The Court: Sustained.

Q. Do you know from your own knowledge whether or not the document was passed upon and adhered—

Mr. Openlander: Objection to even asking the question.

The Court: I am going to sustain an objection to asking that question.

Mr. Heisler: I think I am prevented from asking any further questions of this witness; and I offer at this time the document as far as it was identified and statement made with reference thereto in evidence.

The Court: The objection to it will be sustained.

Mr. Openlander: I believe, in order there shall be no further controversy about this, that I will stipulate for the purpose of the record that the resolution set forth in this Document J was passed as therein stated.

Mr. Heisler: Your witness.

Mr. Openlander: I have no cross-examination.

Mr. Heisler: The court passed upon this document, Defendant's Exhibit J. Just for the purpose of the record—

The Court: I take it, that is a copy of the resolution.

Mr. Heisler: And I offer it again after the government's statement.

The Court: I sustain the objection to it.

Thereupon, the defendant,

LARRY GARA,

resumed the witness stand and further testified:

CROSS EXAMINATION

By Mr. Openlander:

Q. Mr. Gara, you were telling us about your prison terms. Proceed with that, would you? A. In June, in 1942, I notified—

Q. Tell us about the times you were in.

Mr. Heisler: I don't think that is fair, the defendant should be asked the question about being in prison, and then excluding him to tell what for he was there.

Q. The first time you were in prison, what were you in for? A. I was in because on the basis of conscience I refused to register for the Selective Service Act, and I wrote to the District Attorney in my home district, telling him about that.

Q. You have answered that question. A. Yes, but that is important.

Q. If you think that is important go ahead? You wrote to the United States District Attorney and told him you did not intend to register; he had you arrested; you were brought into court; you entered a plea of guilty and were sentenced? A. Entered a plea of nolo contendere.

Q. And you were sentenced? A. That is correct.

Q. Now what was the second time? A. I will have to give some background on this in order to explain it.

Q. Were you called in for a violation of the parole the second time, or were you prosecuted on another charge? That is what I would like to know. A. I was not prosecuted twice.

Q. You were in as a parole violator? A. Not in my mind.

Q. In the mind of the government? A. I had never agreed to any parole conditions. I was put out of prison without signing any papers, and returned for not obeying conditions which were imposed upon me. I never signed conditions.

Q. And conditions imposed upon you were what? A. One of them was that I return to Reading, Pennsylvania. Another was that I would obey the laws of the land.

Q. Including the Selective Service Law? A. Including the Selective Service Law.

Q. That is the one you refused to obey, is that it? A. No, I don't believe; I believe I refused to fill out forms of parole when I had never accepted parole.

Q. You were out for a couple of days, and then they took you back in, is that right? A. That is right. Excuse me. I should like to correct something. Charles Rickert this morning made a statement I was sentenced for a questionnaire.

Q. That is what confused me? A. Yes, I believe that was an error. I don't believe he was clear as to that.

Q. I believe that you said this morning that you believe in non-registration, and that you will identify yourself with non-registrants, is that right? A. Who do it on the basis of conscience.

Q. And that you believe people have an obligation to break an immoral law, if they are convinced of the immorality of that law? A. Just as was established in the Nuremberg trials.

Q. Is that a fair statement of your position: you believe it is all right; people have a duty and obligation to break a law they consider immoral? A. No. I say if some one is so deeply convinced, so deeply conscientiously convinced, that a law is wrong that he is willing to go so far as to die for violating that law—that I think is the acid test of conscience—then he has an obligation to break the law: not any law, or any person.

Q. But any law he feels that way about, is that right? A. If he is a conscientious person, yes.

Q. And that of course in your mind—is that confined just to the Selective Service law or confined to any other law that a person might have that feeling about? A. I would have to judge each situation as it comes along. It is not including all laws.

Q. It is possible, and you would want to have a little more detail before you would answer that question; is that right? A. Well, for example, I would probably have disobeyed the fugitive slave law. That was a law in American history saying a person had to help the United States Government catch fugitive slaves. That was a law I would probably have disobeyed, as Emerson did.

I would not advocate people indiscriminately disobeying the law until the law is replaced by conscientious and sincere people. If you had a perfect society, you might say that laws would be unnecessary. But I would not say that. I would say one must be very, very careful before

he would disobey any law; and that I myself, as far as I know, have never disobeyed any law except the Selective Service Law in 1942.

Q. I believe you said that Bluffton College was not in exact harmony with your position? A. That is correct.

Q. You did say that? A. That is correct.

Q. As a matter of fact, is that not an understatement? Is it not a fact within a day or two after Rickert was arrested, the President of the College, in an assembly meeting or a gathering of the students, urged them to register and comply with the provisions of the Selective Service Act? A. I was not at any such meeting; but I don't believe the College would go on record as urging people to disobey their conscience. If a person conscientiously opposed registering, I believe the Mennonites would support him in that belief.

Q. Do you not know that a day or two after Rickert was arrested, the President of the College—I believe it was the President—in an assembly or gathering of students—whatever they call it—urged them to comply with the provisions of the Selective Service Act? A. I don't know that.

Q. You have heard that that was done? A. I have heard there was a Chapel Address, but I don't know that was included in it. We have the President here. You could ask him.

Q. I believe there was one other thing: you stated you assured Rickert that you and your organization would back him in his stand? A. I never said my organization. I have no organization.

Q. Well, the organization to which you belong? A. No, I don't believe I said anything about that.

Q. Remember that was said during an interview you had with Mr. Tootell and the other men? A. I don't remember anything about that.

Mr. Openlander: That is all.

Mr. Heisler: That is all, thank you.

Thereupon, the defendant called as a witness,

IRWIN W. BAUMAN,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. What is your name? A. Irwin W. Bauman.

Q. Where do you reside, Sir? A. I reside at 124 West Kibler Street, Bluffton, Ohio.

Q. What is your occupation or profesion, Sir? A. I am an ordained minister, teaching in Bluffton College, teaching Sociology there.

Q. You are a Member of what church? A. The General Conference of the Mennonites of North America.

Q. You were born as a Mennonite? A. Yes, I was. My folks have been Mennonites so far back as I know; over two hundred years.

Q. Is it a fact that your ancestors left Europe because of the persecution of the Mennonites over in Europe? A. That is right.

Q. Ever since your family has maintained its connection with the Mennonite Church? A. My father's family did. My mother's originally were what they called Schwenfelder, who also were driven out of Europe. They later on joined the Reformed Church, and my mother died a member of the Reformed Church.

Q. You were all your life a member of the General Conference of Mennonites of North America? A. Yes, sir.

Q. How long have you been teaching at Bluffton? A. I came there in the fall of 1929. I have been out one year, summer, doing rehabilitation work for the blind of the State of Ohio, Department of Public Welfare.

Q. What department are you in, Sir? A. Sociology.

Q. Do you occupy any administrative position with the College? A. I am also Head of the Division of Social Sciences.

Q. Is that the Division in which Mr. Gara is a Teacher? A. Yes, sir.

Q. You know Mr. Gara? A. I have known him since he has come to the College.

Q. That was how long ago? A. I met him during possibly the middle of August or so. I am not exact on my date when he came for an interview at the College. And then after he arrived to take up his work, that was possibly about the first of September, a little after, maybe about the 5th of September, I would say, I saw him in Church; and then we had Retreat at the College for the Faculty, where I met him; and that was the first time I became acquainted with him.

Q. Since he was appointed to the College, did you have appointments to meet him? A. Yes, we met from time to time.

Q. How often? A. We met in regular faculty meetings, and various occasions like that; but when we meet on the campus we talk to each other. Several times he came to my office. I would say I probably saw him every other day or so, but we did not always have any lengthy conversation.

Q. Did you visit him socially, besides your professional contact? A. I have not visited in Ropp Hall where he lives; but in our faculty meetings, where we all get together, yes, I have become acquainted with him.

Q. Do you know any other people on the campus who know Mr. Gara? A. The whole faculty does, of course.

Q. Do you know the general reputation of Mr. Gara on the campus for truth and veracity? A. As far as I know—

Q. Do you know his general reputation?

The Court: Just answer yes or no.

A. I know.

Q. Do you know his reputation? A. Yes. I know that his reputation is good.

Q. What is that reputation? A. He has a reputation of being honest in his statements. You said telling the truth: I think that would be included.

Q. Did you have a chance to talk to Mr. Gara concerning his religious beliefs with reference to the selective service law and obedience thereto?

Mr. Openlander: It was my understanding this man was called as a character witness.

Mr. Heisler: Yes.

Mr. Openlander: He already testified. I am not sure the question put was proper, but I made no objection to it. Now apparently we are proceeding to something else. I am going to object to any further questioning along that line.

The Court: Do you want to confine him to the position of a character witness?

Mr. Heisler: No, I would like to ask him a question.

The Court: You are now making a general witness out of him?

Mr. Heisler: No, I just want to have, on the basis of my understanding what a character witness is, a particular portion of the character or reputation of the person; and that would be with reference to Mr. Gara's attitude expressed to this witness concerning Gara's religious approach to the problem of selective service.

Mr. Openlander: That is not the controversy, Your Honor.

The Court: I will sustain the objection to that.

Mr. Heisler: That is all. Your witness.

Mr. Openlander: No cross examination.

Thereupon, the defendant called as a witness,

LLOYD L. RAMSEYER,

who, being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Heisler:

Q. Will you state your name, Sir? A. Lloyd L. Ramseyer.

Q. Where do you live, Sir? A. 280 West College Avenue, Bluffton, Ohio.

Q. What is your occupation? A. President of Bluffton College.

Q. How long have you been President of Bluffton College? A. Since November 5, 1938.

Q. Do you belong to any church? A. I am a Member of the General Congress of the Mennonite Church of North America.

Q. Are you a layman or an ordained minister of the church? A. I have been ordained, not quite in the regular way, but for educational purposes; but with authority to conduct the rites of the Church.

Q. To a limited extent you are ordained to perform certain functions? A. Professionally; I am a Teacher rather than a Minister.

Q. This College, if I understand, is supported by the General Conference of the Mennonites, is that correct? A. That is right.

Q. You have known Mr. Gara, the defendant here, for any length of time? A. I met him first one day when, at our request, he came to the Campus for an interview. I am not at all certain of the date. I think it must have been early August.

Q. What year? A. 1948; and then he came, arrived on the Campus approximately September 1st.

Q. Did you hire him? A. We did.

Q. In what capacity did you hire him? A. As Instructor in History and as Acting Dean of Men.

Q. Ever since he remained on the Campus? A. Well,—

Q. He lived on the campus and maintained his position there? A. That is right, yes.

Q. Did you have an opportunity to meet him since that employment? A. Very frequently, yes.

Q. Do you know other people who have met him and learned about him since he has been at Bluffton? A. Naturally, he is well known on the Campus.

Q. Do you know the reputation of Mr. Gara as to truth and veracity? A. He is known as a man who tells the truth.

Mr. Heisler: That is all.

CROSS EXAMINATION

By Mr. Openlander:

Q. Doctor, you are President of the College? A. I am.

Q. You heard me ask Mr. Gara about a talk that I understood was made, in which you urged boys to register?

Mr. Ohlinger: Qbjection to that question.

The Court: Sustained. He was called as a character witness.

Mr. Openlander: I do not mind making the Doctor my witness on this point, Your Honor. I have just two questions to put to him.

The Court: If you want to cross examine, you may cross examine only upon a subject within the scope of the direct examination.

Mr. Openlander: All right.

Mr. Heisler: That is all, Doctor Ramseyer, thank you.

If Your Honor please, just for the purpose of the record, may we on behalf of the defendant resubmit all of the exhibits, so that there should be no mistake about it: A, B, C, D, E, F, G, H, I and J. I would like to state.

if there is no objection, we want to be sure we offered them. And I suppose the rulings of the court will appear from the record.

Mr. Openlander: Are you offering any now that you had not offered before?

Mr. Heisler: No.

The Clerk: D, E and G are already in.

Mr. Heisler: Then I understand, Your Honor, that A, B, C, F, H, I and J: A, B and C were offered and rejected; F was offered and rejected; H was offered and rejected; I was offered and rejected; and J was offered and rejected. Is that correct, Your Honor?

The Court: I think that is correct. I do not have the notation.

Mr. Heisler: The clerk has it here.

The Court: Any further witnesses?

Mr. Heisler: That is all, Your Honor.

Mr. Ohlinger: We rest here; but we have a motion, Your Honor, depending upon whether Mr. Openlander wishes to offer any rebuttal testimony.

The Court: Any rebuttal?

Mr. Openlander: No, Your Honor.

Mr. Ohlinger: Then we wish to make a motion, and we wish at this time to move for a judgment of acquittal, in the terms of the motions that were made at the close of the opening address of the government attorney, and in the terms of the motion that was made at the close of the government's case, and we make that motion upon all the grounds heretofore stated. I don't think it is necessary for me to restate those grounds to Your Honor, if the record can show those grounds are all repeated in this present motion.

The Court: It may so show. The motion will be overruled.

Proceed with the arguments.

Thereupon, closing arguments were made to the jury by counsel on behalf of the respective parties.

CHARGE OF COURT

Ladies and gentlemen of the jury, it now becomes my duty to charge you as to the law in this case. While you are the sole judges of the facts and the credibility of the witnesses, it is incumbent upon you to take the law as the court charges it to you.

The defendant, Larry Gara, is on trial. The government is required to prove his guilt by the production of evidence that satisfies you that he is guilty beyond a reasonable doubt.

The defendant has entered his plea of not guilty to the indictment. By his plea of not guilty he has put in question and at issue every material part of the second count of the indictment, and the burden of proof upon the issues made by the averments in said count of the indictment, and his plea of not guilty thereto, is upon the government of the United States to establish the proof of each essential element in the count of the indictment beyond a reasonable doubt.

The fact that an indictment was returned against this defendant does not raise a presumption of guilt against him. Under the Constitution of the United States one charged with crime is presumed to be innocent until proven to be guilty. Therefore you will understand that the defendant is presumed to be innocent, irrespective of the fact that an indictment was returned against him, and this presumption goes with him throughout the trial of this case and until your final conclusion upon the facts and circumstances in the form of a verdict.

I have said to you that the burden of proof is upon the government to prove the guilt of this defendant beyond a reasonable doubt. By a reasonable doubt is meant an honest uncertainty. When you lack an abiding conviction to a moral certainty of the truth of the charges, considering all of the evidence, then it may be said that you have a reasonable doubt. It is a substantial misgiving caused by insufficiency of the proof, an insufficiency which fails to

convince your judgment and conscience and satisfy your reason of the guilt of the accused. It is not a mere capricious doubt or a mere ingenious doubt, such as one might, by some process of ingenuity, be able to raise in his mind, not amounting to an honest uncertainty, but it is, as I have stated, an honest uncertainty. If the whole of the evidence, when carefully examined, weighed and compared, produces in your mind a settled conviction or belief of the guilt of the defendant, as charged in the second count of the indictment, such a conviction as you would be willing to act upon in the more important and weighty matters relating to your own affairs, then you would not have a reasonable doubt and you should find a verdict of guilty in accordance with that conviction and belief. If, on the other hand, the proof leaves your minds in such a state of doubt and uncertainty as to the guilt of the defendant as would deter you from acting in important matters which concern yourselves, such a state of mental uncertainty would constitute a reasonable doubt. If you have such a doubt thus arising, it becomes your duty to acquit the defendant in accordance with that doubt. You must bear in mind that evidence of guilt beyond all possible doubt is not necessary but only evidence beyond a reasonable doubt.

The jury is the arbiter and final judge of the facts in this case. It is for you to determine the facts, considering the evidence and the surrounding circumstances in the light of the legal principles which govern you, and which it is the province of the court to state to you. When those legal aids and guides are stated, it is your duty to follow the instructions given and apply them to the facts as you find them to be from the evidence.

After you have reached your verdict, it is the duty of the trial judge, in the event you find a verdict of not guilty, to dismiss the defendant. In the event of a verdict of guilty, it is the duty of the court to determine and impose the sentence upon the defendant. You are in no wise concerned with the imposition of sentence or the amount thereof. If at any time in this charge the court should

give expression or appear to give expression to any view as to the evidence or what the evidence has shown or with respect to the credibility of any one or more of the witnesses, you will understand that he is expressing only his personal views, which are in no way binding upon your deliberations. You and you alone are the judges of the evidence.

Likewise you are the sole judges of the weight of the evidence and the credibility of the witnesses. You are to determine the extent to which each witness is to be believed and the importance and weight which is to be given to his testimony. In considering the testimony of a witness you may take into consideration his apparent interest, if any, in the outcome of the case; his connection, if any, with any of the parties in the case; his connection in any way with the case itself, and any bias or prejudice which he might be expected to have as the result of such interest or connection. These are simply facts which may be considered in weighing the testimony of a witness. You may also take into consideration the demeanor of the witness upon the stand; his frankness and candor or lack thereof; whether or not there was anything in his manner of testifying that would indicate such prejudice or bias as might induce him to color or exaggerate or falsify his testimony in favor of or against either party in the case; and every other attendant fact or circumstance upon which you might reasonably base a conclusion as to the credibility of his testimony. In considering conflicting statements of different witnesses, it is your duty to reconcile them in so far as that may be reasonably done. You have not the right to reject arbitrarily and without reason any part of the testimony, but having given all the facts and circumstances touching credibility due consideration, it is for you to say to what extent the testimony of each witness shall be believed.

The defendant has testified in his own behalf in this case. Weigh his testimony as you would that of any other witness in the case and give or withhold credit as may to you seem proper.

You are further instructed that neither the indictment, the opening statements of counsel, nor the arguments of counsel, are evidence in the case, and none of these are to be considered by you as evidence in deciding the facts in the case. This applies also to remarks of the court made during the progress of the trial and to evidence stricken out or which you may have been instructed to disregard. However exhibits which have been introduced in evidence in this case and admitted into evidence are a part of the evidence, and you will consider them as such. Any admissions made by counsel in open court and agreed to in your presence you are to consider not only as evidence in the case but also as admitted facts therein.

The court desires to direct your attention to the indictment and the law applicable thereto. When you go to the jury room, the indictment will go with you and you may read and study it as much as you may deem necessary.

The indictment in this case, omitting Count No. 1, which has heretofore been dismissed, and reading only the second count, upon which the defendant is here being tried, is very short, comprised of simple language, and ought to be easily understood. It reads as follows:

"SECOND COUNT.

"On or about the 8th day of November, 1948, at Bluffton, in the Northern District of Ohio, Western Division, Larry Gara knowingly counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948."

Keep in mind the particular words "knowingly counseled, aided and abetted" because I shall have some explanation of those words to give you as we move along.

In proving the guilt of the defendant under this count of the indictment, the government must establish beyond a reasonable doubt that the defendant did knowingly counsel, aid and abet one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948, and that this offense was committed within the jurisdiction of this court on or about the 8th day of November,

1948. It is not necessary to prove that the act alleged was in fact committed on the exact date named; it is sufficient if it be established that it was committed on or about that date.

The Selective Service Act of 1948, under which this case has been brought, was passed by Congress and became a law on June 24, 1948. It recited, among other things, as a declaration of policy and purpose, Section 451:

"(b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.

"(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

"(e) The Congress further declares that adequate provision for national security requires maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation's technological, scientific, and other critical man-power resources."

As to the persons required by the Act to register, and the time, place and manner of registration, the Act provided, Section 453:

"Except as otherwise provided in this title (sections 451-470 of this title), it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

The Act further provided, with respect to the powers of the President in the administration of the Act, Section 460(b) (1):

"The President is authorized—

"(1) to prescribe the necessary rules and regulations to carry out the provisions of this title."

Pursuant to the foregoing provision of law, as well as the authority to the President contained in Section 453, previously quoted, the President issued Executive Order 9979, promulgated on July 20, 1948, just about one month after the enactment of the Selective Service Act by Congress, and this was done in conformity with the provisions of the Act just quoted to you. Section 611.6 of the Executive Order reads in part as follows:

"(c) Every person who, on the day or one of the days fixed for registration, is required to be registered is personally charged with the duty of presenting himself before the proper officials and submitting to registration.

"(d) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be." * * *

It thus becomes apparent that, if the jury should find that Charles Ray Rickert was required to present himself for registration to his draft board on the 10th day of September, 1948, and that he then and there failed and refused to register as required by the law, then he was in duty bound to present himself for and submit to registration each day thereafter until properly registered, and that duty was a continuing one at all times until he did comply with the Act.

This count of the indictment under consideration and heretofore read to you is based upon a statute of the United States, Section 462 of the Selective Service Act of 1948, which reads in part as follows:

"* * * Any person who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, shall, upon con-

viction in any court of the United States of competent jurisdiction, be punished as thereinafter provided * * *."

You will note that the statute requires that a person knowingly counsels, aids, or abets another; and you will note, also, that the count of the indictment also charges that "Larry Gara knowingly counseled, aided and abetted," &c.

The primary definition of the word "knowingly" is with knowledge. The word "knowingly" is often used interchangeably with the word "wilfully." In their ordinary acceptation, the words "wilfully" and "knowingly," when applied to an act or thing done, import knowledge of the act or thing so done or said, as well as a deliberate intent to do or say the thing done or said. Thus it becomes apparent that the intent with which a thing is done becomes important, and it is important in the case before us. A person may idly or capriciously make statements that might be construed to be a violation of some law, but where intent is a necessary element it must be proven to your satisfaction as a jury that the defendant knowingly and intentionally made the statements charged so as to constitute an offense against the law.

In the trial of this case, the court has permitted reference to a speech made by the defendant in the State of Pennsylvania on or about the 25th day of August, 1948, the reference coming before us by way of an admission made by defendant to government witnesses. The court has permitted the introduction of a pledge slip or declaration of the defendant, after proper identification, as a paper writing in which the defendant is said to have pledged a certain course of conduct; and the court has admitted three letters written by defendant and addressed to government attorneys. At the time this evidence was admitted, the court specifically charged the jury that they were to consider this evidence only as it bore upon the question of the intent of the defendant, because it is charged that he "knowingly counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948."

I want to repeat that caution to the jury. You understand that there is a thoroughly established rule of law that acts not charged in an indictment cannot be proved, among other reasons, because no testimony is pertinent unless it relate to the matters charged in the indictment, and as to which an issue is formed by the plea of not guilty; and because the accused, having no notice that testimony as to any other act would be offered, could not be prepared to meet it. But to this general rule there is at least one important exception, and where the intent with which an act charged to be criminal has been done becomes important, as it necessarily is in this case, then, within certain limits, proof of similar acts of the accused is admissible in order to show the intent with which the act charged in the indictment was done.

You will therefore consider this evidence as having been admitted only for the purpose of enabling the jury to obtain some index into the mind of the defendant on the question of his intent when it is charged that he knowingly counseled, aided and abetted another person to refuse or evade registration.

You are further charged that it is not necessary in this case for the government to prove that the counseling, aiding and abetting charged against Larry Gara actually accomplished its purpose by way of causing Charles Ray Rickert to refuse or evade registration. The Act does not so require. The Act merely says "any person who knowingly counsels, aids or abets another to refuse or evade registration." The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they would have a tendency to cause a refusal of duty as required by the Act. The counseling may prove fruitless, but regardless of this the person who does the counseling by the very act of so doing may commit an offense against the law of the United States. The crux or gravamen of the offense is to knowingly counsel, aid or abet, and whether the one counseled, aided or abetted in the end finally accepts the advice, the aid or the assistance and acts upon it is not necessary for the government to prove to the satisfaction of the jury.

In further analyzing the count of the indictment, you will note that it provides that Larry Gara knowingly counseled, aided and abetted. To counsel means to advise, to give advice to, to offer an opinion as worthy or expedient to be followed.

The words "aiding" and "abetting" are not synonymous. To abet is to encourage, counsel, incite, or instigate the commission of a crime. To aid is to support.

It is contended that the First Amendment to the Constitution of the United States guarantees to a citizen the right of free speech, and that the defendant at no time did more than exercise his constitutional right of free speech.

You are instructed that words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.

It is a constitutional provision that a person has the right of freedom of speech, and Congress, true enough, has no right to enact laws abridging the freedom of speech except under certain definite conditions. The Congress in its wisdom has the right to enact laws which it deems necessary for the public safety, general welfare, or the security and safety of our country, even though by so doing a person's right of free speech is curtailed. In its wisdom Congress has provided what is known as the Selective Service Act of 1948, and in that Act it has specifically said that any person who knowingly counsels, aids or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title or of said rules, regulations or directions shall, upon conviction, be punished as thereinafter provided. This was and is a prerogative of the Congress, and the right of free speech does not extend to such a point as to permit an individual to knowingly violate the law and then excuse the violation by alleging a reliance upon the First Amendment to the Constitution which grants him the right of free speech.

It is the apparent contention of the defendant that he did not counsel, aid or abet Rickert in his refusal to register on September 10, 1948, but merely that he supported him in his attitude after he, Rickert, had decided in his own mind not to register because of his religious beliefs or the dictates of his own conscience. You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948, under the circumstances then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the Selective Service Act of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the second count of the indictment.

You are instructed that it is the law that although one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection. One is criminally responsible who does an act which is prohibited by a valid criminal statute though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty.

The defendant here is not being tried for his religious beliefs. So far as the issues involved in this case are concerned, his religious beliefs are immaterial. The Constitution of the United States expressly protects the freedom of religion, as well as freedom of speech and of the press. Thereby Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. One of the purposes of the union of the States, as stated in the preamble to the Constitution, was to provide for the common defense, and Congress was given the power by the Constitution to raise and support armies and to provide and maintain a navy, and under this power

Congress has authority to make laws that may be needed to execute the powers vested in the national government. The very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. This includes the right in Congress to pass selective service laws such as the law involved in this case; and you may assume, for the purposes of your consideration of this case, that this law and the regulations made pursuant thereto are constitutional, valid and binding.

When a law is passed by Congress and signed by the President of the United States, and so long as it is in effect and is not held to be unconstitutional, or repealed or amended, it is incumbent upon all persons residing in these United States to obey it. They may oppose it before it is enacted into law. They may work for its repeal afterwards. But they may not flaunt the law while it is in effect and disobey it without being liable to prosecution for its violation and punishment therefor according to law, if found guilty; and it is no defense to a defendant charged with violation of a criminal law of the United States, in effect at the time of the commission of an alleged offense by the defendant, to assert or prove that the law which he is accused of violating is contrary to his religious, philosophical, political, social or economic beliefs, or that its compliance would violate the dictates of his own conscience, or that a large number of other persons share his belief. The law as written by the Congress that confronts us today says any person who violates the provisions of this Act; no exception is made.

The defendant has testified that he was a member of a Society of Friends or Quakers, a religious sect, one of whose tenets is opposition to war and refusal to bear arms; and that he, because of his religious convictions conscientiously believed the Selective Service Law is immoral, unfair and unjust; and his counsel has argued to you that the conduct of the defendant with which he is charged in this case was the result of his conscientious religious convictions, and for that reason he should not be found guilty as

charged. You are instructed that such a belief, no matter how earnestly or conscientiously entertained, is not of itself a valid defense, excuse or justification for the violation of the law, if you find that the defendant did violate it, and that it should not be considered by you on the question of his guilt or innocence of the offense charged in the indictment.

In view of the argument made to the jury in support of this contention, the court deems it proper to say to you that the Congress of the United States was careful in the passage of the Selective Service Law to preserve the rights of bona fide conscientious objectors in providing in this law that it should not be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form; and further provided that if he is inducted into the armed forces under the law, he shall be assigned to non-combatant service, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred.

If you find under these instructions that the government has proven beyond a reasonable doubt that the defendant did knowingly counsel, aid and abet one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948, then you should find the defendant guilty. On the other hand if you should find that the government has failed to prove these facts beyond a reasonable doubt, then you must find the defendant not guilty.

As the court has already said to you, this is an indictment charging that the defendant, on or about the 8th day of November, 1948, knowingly counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948. It is not an indictment charging the defendant with counseling aiding and abetting Rickert in refusing to register on September 10, 1948. It is in evidence here that Rickert on that date refused to register under the Selective Service Act of 1948.

You are instructed that, under that Act and the Regulations which the President of the United States promulgated by Executive Order pursuant to the authority conferred upon him by law, it is the law that Rickert, having refused to register on September 10, 1948, which was the day prescribed for men of his age, had the continuing duty to register after that date and on November 8, 1948; and if you find under these instructions that the defendant on November 8, 1948, counseled, aided or abetted Rickert to evade or refuse registration or in continuing his refusal to register, and that the defendant did so knowingly, as charged in the indictment and proved to your satisfaction by the evidence in this case beyond a reasonable doubt, or if the natural and probable effect of what the defendant said to Rickert on November 8, 1948, under the circumstances there and then present, was of such a nature that it had a tendency to cause Rickert to continue his refusal to register under the Selective Service Act of 1948, whether or not it actually had that effect, you will find the defendant guilty as charged in the second count of the indictment.

If you find, under these instructions, beyond a reasonable doubt, that the natural and probable effect of what was knowingly said by the defendant to Rickert on November 8, 1948, was to encourage his resistance to the Selective Service Law by continuing in his refusal to register, whether or not it actually had that effect, you may consider such statements as coming within the intent and meaning of the words "counsel, aid and abet," as contained in the portion of the Selective Service Act of 1948, under which the defendant is charged.

In arriving at your conclusion upon the evidence and testimony in this case as presented to you, you are to exercise your own judgment as the result of your own conclusions and from your own reasoning. This does not mean that you should not listen to or accept the reasoning of your fellow jurors; but it does mean that your own independent judgment must be exercised in the final analysis, and that the conclusion at which you arrive as a jury must be the collective result of your own best judgment, brought

about by serious and cooperative exchange of ideas and recollections as to the evidence.

In this court all twelve jurors must agree on the verdict returned. No verdict can be returned unless all of you concur in it. When you retire to your jury room you will select a foreman. He will sign the verdict on the line on which the word "Foreman" is printed. The indictment and exhibits will go to the jury room with you. When you arrive at your verdict you will notify the bailiff, and he in turn will notify the court.

You will have before you a form of verdict which, omitting the caption, reads as follows:

"We, the jury in this case, being duly impaneled and sworn, do find the defendant is"—blank.

In there will be inserted by the foreman the word "Guilty," or the words "Not guilty." There is following a line under which is typed the word "Foreman," and on that line the foreman shall sign his name. When you retire to your jury room you may select your foreman, as the court has said to you, and you may then enter into the deliberation of the case.

Any additions or exceptions upon the part of the government?

Mr. Openlander: No, Your Honor. The government is satisfied.

The Court: Any additions suggested on the part of the defense?

Mr. Ohlinger: Yes, Your Honor.

The Court: Any exceptions suggested upon the part of the defense?

Mr. Ohlinger: Yes. We should like to make them in accordance with Rule 30.

The Court: The bailiff may take the jury out through the corridor to the rest room at this point, as counsel desires to make a statement for the record. You will not begin your deliberations until you have been brought back here and sent to your jury room. Do not discuss the case at this point.

Thereupon, the jury left the court room, and the following proceedings were had, to-wit:

The Court: You may state your suggested additions or exceptions.

Mr. Ohlinger: Your Honor, I believe, is fully advised of our position here, so that I shall not make an extended discussion at this time.

I note that in the charge Your Honor has repeatedly used the words "refused or evaded." We except to those words, for this reason: there is no evidence in this case of evasion; the only evidence is of refusal, which was very frank and open, and therefore no evasion. Evasion means subterfuge, deceit, concealment. For that reason we object.

The Court: I simply quoted the law there from the statute.

Mr. Ohlinger: I know Your Honor did; but I am bringing Your Honor's attention to the fact that there is no evidence of evasion in this case.

Your Honor is also familiar with and fully advised as to our position with regard to Section 611.6(c) of the Regulations; and Your Honor has read those Regulations to the jury, that particular section and subdivision (c) of the section, I believe.

The Court: That is correct.

Mr. Ohlinger: That has been read to the jury. Our position is that so far as the time of registration, the time when a person much come and register, that is not a continuing duty so that it makes it a crime, affer the refusal has taken place, for a person to counsel another.

I want to object further to that statement for this reason: I don't think that that part of the Regulation which the court read to the jury is within the authority conferred upon the President in the Act; it goes beyond that authority, and for that reason is void.

I further wish to call the court's attention to this fact: there is no evasion in this case. There was a refusal on the 10th of September to register, which refusal was final, definite and conclusive at that time. Whatever was said

after that time could have no effect upon the crime that was completed on September 10, 1948, and it was done at that time. There was no further communication between Rickert and the local board and nothing was done until he was arrested on November 8, 1948. Whatever was said on November 8, 1948, was therefore not a counseling of refusing to register because that step had been irrevocably taken before then, and what was said after that was distinctly within the province of free speech, protected by the First Amendment; it was distinctly within the province of freedom of religion and the discussion of religion, as protected by the First Amendment.

We further object to the statement of the court to the jury to this effect, substantially,—I cannot write as fast as the court gave its charge; but as I recall it was substantially to this effect—that if the jury believed that the defendant said certain things to Rickert on November 8, 1948, that that would constitute an offense under the Act. Again, I call the court's attention to the fact that in our view of the Act, the refusal had been completed, and anything said after that was within the purport of the First Amendment.

The court in a number of parts of its charge has referred to clear and present danger. We except to that because in this case there is no evidence of clear and present danger.

We except to the charge of the court in so far as reference is made to conscientious objectors and the possibility of conscientious objectors under the Act going into non-combatant service or being deferred. We except to that because we do not think that is involved in this prosecution and is improper in the charge on this particular prosecution.

Your Honor further charged the jury that if they should find that the defendant, Gara, knowingly counseled, aided or abetted Rickert on November 8, 1948, and they found that beyond a reasonable doubt, they could find him guilty. Again, we come to the proposition that I have referred to: we view the act as having been completed on

September 10; and that this, at that time, was comment, within the protection of the First Amendment, and within the freedom of religion protection of that Amendment.

Your Honor, again, in his charge stated to the jury that the present indictment was not for counseling on September 10, and referred the jury particularly to what happened on November 8. Again, we say in our view of this what was said on November 8 was entirely protected.

Then Your Honor towards the last of the charge said that any words that encouraged the resistance of Rickert would be counseling and aiding. Our same objection applies to that.

Your Honor, I think that that covers our view of this, whether it is right or wrong; and we have had so much discussion of this matter in the course of the trial that it is not necessary for me to elaborate further on these points. We simply say that with all deference to the court, we must differ with the view of the court, and take our exceptions pursuant to what I have said, and pursuant to the points that we have presented all of the way through the trial.

The Court: Very well. You may summon the jury.

Thereupon, the jury returned to the court room and the following proceedings were had, to-wit:

The Court: The bailiff may take the jury to the jury room.

Certified a correct transcript:

Lawrence Lennon,
Official Reporter.

TRIAL ENTRY OF MARCH 9, 1949

This day came the parties by their attorneys and the Government dismisses Count 1 of the Indictment. Thereupon came the following named persons as jurors, to-wit: Mrs. Neva Bichan, Dorothy Elliott, Laura E. Clift, Mrs. Cecil Laird, Dorothy F. Maher, Anna M. Schultz, Ira Patterson, William Luttenton, Milt Solomon, Kirk Frey, Daniel J. Sobczak, and Eugene J. Kelsey who were duly impaneled and sworn according to law and the trial of this cause was begun.

Opening statements of counsel being concluded, the defendant moved the court for entry of a judgment of acquittal, on the opening statement of Government counsel and the court overrules the motion.

The taking of evidence adduced on behalf of the Government was begun but not concluded. The hour of adjournment having arrived, further proceedings herein are continued to tomorrow morning at 10 A. M. FLK

TRIAL ENTRY OF MARCH 10, 1949

This day again came the parties by their attorneys and also came the jury heretofore impaneled and sworn and the trial of this cause proceeded.

The taking of testimony adduced in behalf of the Government was resumed and concluded.

The defense thereupon moved the court for judgment of acquittal, which motion was argued by counsel, and the court reserved his decision on such motion.

The taking of testimony adduced in behalf of the defendant was begun but not concluded. The hour of adjournment having arrived, further proceedings are adjourned until tomorrow morning at 10 o'clock FLK

TRIAL ENTRY OF MARCH 11, 1949

This day again came the parties by their attorneys and also came the jury heretofore impaneled and sworn herein and the trial of this cause proceeded.

The taking of testimony adduced in behalf of the defendant was resumed and concluded.

Defendant by his counsel thereupon moved the court for judgment of acquittal, which motion was overruled by court.

Argument of counsel having been made and the hour of adjournment having arrived, further proceedings are adjourned until Monday morning at 10 o'clock. FLK

TRIAL ENTRY OF MARCH 14, 1949

This day again came the parties by their attorneys and the jury heretofore duly impaneled and sworn herein and the trial of this cause proceeded.

All evidence, opening statements and arguments of counsel having been concluded, the court charged the jury which retired to its jury room in charge of a sworn officer of this court, there to deliberate upon its verdict.

And now comes said jury into open court with its verdict in writing which reads and is in the words and figures following, to-wit:

"In the District Court of the United States
for the Northern District of Ohio
Western Division
No. 9501 Criminal
The United States of America
vs.
Larry Gara

VERDICT

Filed: C. B. Watkins, Clerk U. S. District Court
N. D. O., Mar. 14, 1949, PM

We, the jury in this case, being duly impaneled and sworn, do find the defendant is Guilty.

/s/ William H. Luttenton,
Foreman."

It is therefore ordered that the defendant file herein his motion for new trial under Criminal Rule No. 33, on or before March 21, 1949, and

The bond on which the defendant is now released from custody is continued. FLK

VERDICT

(Filed Mar. 14, 1949)

We, the jury in this case, being duly impaneled and sworn, do find the defendant is guilty.

William M. Luttenton,
Foreman.

MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

(Filed Mar. 21, 1949)

Defendant in accordance with Rule 29(b) of the Federal Rules of Criminal Procedure hereby renews each of the motions for judgment of acquittal made by him after the close of the opening statement to the jury by the attorney for the Government, after the close of the evidence offered by the Government, and after the close of all the evidence, upon each and every of the grounds presented by defendant in support of said motions.

In the event that the foregoing motion is denied, defendant moves the court in the alternative to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for a judgment of acquittal made at the conclusion of all the evidence.
2. The verdict is contrary to the weight of evidence.
3. The verdict is not supported by substantial evidence.
4. The verdict is not supported by any evidence.

5. The court erred as to each of the following described exhibits in receiving the same in evidence:

Government's Exhibits 2a and 2b; Government's Exhibit 3, being coupon attached to Government's Exhibit 3a; Government's Exhibit 7, letter from defendant to Attorney General, dated September 30, 1948; Government's Exhibit 8, letter from defendant to District Attorney, dated November 8, 1948; Government's Exhibit 9, letter from defendant to District Attorney in Chicago, dated November 12, 1948.

6. The court erred as to each of the following described exhibits in refusing to receive the same in evidence:

Defendant's Exhibit A, letter from Charles Ray Rickert to Draft Board, dated September 10, 1948; Defendant's Exhibit B, statement of Draft Board, dated September 10, 1948; Defendant's Exhibit C, letter of Chairman of Draft Board to District Attorney, dated October 19, 1948; Defendant's Exhibit F, mimeograph copy of tenets of Society of Friends; Defendant's Exhibit H, letter of defendant to President Truman, dated March 31, 1948; Defendant's Exhibit I, "A Call to American Citizens of Draft Age"; Defendant's Exhibit J, Resolution of Ohio Council of Churches.

7. The court erred in refusing to receive in evidence the testimony of Charles Ray Rickert to the effect that in June, 1948, he had fully decided not to register under the Selective Service Act of 1948.

8. The court erred in refusing to receive in evidence the testimony of Abraham Rickert as to the communication he had received from Charles Ray Rickert in June, 1948, regarding his decision not to register.

9. The court erred in refusing to receive testimony of Robert Amstutz as to conversations between witness and defendant, and advice defendant had given witness.

10. The court erred in charging the jury that they were to determine whether defendant had knowingly counselled, aided or abetted Charles Rickert to refuse or evade registration.

11. The court erred in charging the jury as to "clear and present danger."

12. The court erred in his charge as to what constitutes "clear and present danger."

13. The court erred in charging the jury that they could find defendant guilty if they found beyond a reasonable doubt that on or about November 8, 1948, defendant counselled, aided or abetted Charles Rickert to "refuse or evade registration," whereas the undisputed evidence showed that Charles Rickert had on September 10, 1948, already positively refused to register.

14. The court erred in charging as aforesaid when there was no evidence that Charles Rickert had on September 10, 1948, or at any other time evaded, or sought to evade registration, and no evidence that defendant had counselled, aided or abetted Charles Rickert to evade registration.

15. The court erred in charging the jury that the duty to register continued at all times, and that after Charles Rickert had on September 10, 1948, refused to register, defendant could counsel, aid or abet Charles Rickert to refuse to register.

16. The court erred in charging the jury that what the Government charged defendant said on November 8, 1948, would constitute an offense under the law.

17. The court erred in charging the jury as to the service available to a conscientious objector under the law, because such charge was entirely aside from the issues in this case and prejudiced the jury against a fair consideration thereof.

18. The court erred in denying defendant's motion that it discharge the jury from further consideration of the case.

19. Other errors committed by the court, as shown by the record herein to which defendant duly objected.

Francis Heisler,
1324 Chicago Temple Bldg.,
Chicago, Ill.,
Gustavus Ohlinger,
1507 Toledo Trust Bldg.,
Toledo, Ohio,
Attorneys for the Defendant.

SUPPLEMENT TO MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

(Filed May 5, 1949)

Now comes the defendant and supplements his motion for judgment of acquittal or in the alternative for a new trial and adds the following reason for his acquittal or for granting a new trial:

Charles Ray Rickert committed no crime under the Selective Service Act of 1948 (assuming said act was constitutional but waiving no rights to attack its constitutionality). His conduct was within the contemplation of said law, and therefore the urging of said conduct (if it was urged) by defendant can be no crime.

Respectfully submitted,

Stanley U. Robinson, Jr.,
5 East Long Street,
Columbus, Ohio.

Francis Heisler
1324 Chicago Temple Building
Chicago, Illinois.
Attorneys for Defendant.

JOURNAL ENTRY OF MAY 6, 1949

This day came the parties by their attorneys and the motion of G. A. Ohlinger for permission to withdraw as counsel of record for defendant is allowed.

The court having heard counsel briefly in argument on the motion and supplemental motion for judgment of acquittal or, in the alternative, for a new trial, having considered the briefs of the parties thereon, and being fully advised in the premises, overrules the motion and supplemental motion, with exceptions being allowed the defendant.

FLK.

JUDGMENT AND COMMITMENT
(Filed May 6, 1949)

On this 6th day of May, 1949, came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948 as charged in count 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) months.

It now appearing to the court that the conditions of the bond given herein have been fully complied with, it is adjudged that the clerk refund to the defendant the sum of $2,000.00 heretofore deposited in the registry of the court in lieu of surety on said bond.

It is adjudged that the motion of the defendant to be admitted to bail pending appeal be and hereby is overruled.

It is ordered that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Frank L. Kloeb,
United States District Judge,

The court recommends commitment to: Medical Center for Federal Prisoners, Springfield, Missouri.

RETURN

Defendant elected, on May 6, 1949 not to commence service of the sentence.

NOTICE OF APPEAL
(Filed May 6, 1949)

Name and address of appellant. Larry Gara, Ropp Hall, Bluffton, Ohio.

Name and address of appellant's attorneys. Stanley U. Robinson, Jr., 5 East Long Street, Columbus, Ohio, and Francis Heisler, Chicago, Illinois.

Offense. Counseling, aiding and abetting one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948.

Appellant was found guilty on March 14, 1949 of counselling, aiding and abetting Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948, and was sentenced to 18 months and is now in Toledo County Jail.

We, the appellant's attorneys, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the above stated judgment.

Dated May 6, 1949.

Stanley U. Robinson, Jr.,
Francis Heisler,
Attorneys for Appellant.

Copy of this Notice of Appeal received.

Gerald P. Openlander,
Ass't. U. S. Atty.

CLERK'S STATEMENT OF DOCKET ENTRIES

1. Indictment for violation of Section 12(a), Selective Service Act of 1948, filed January 4, 1949.
2. Arraignment, Plea Not Guilty entered January 7, 1949.
3. Trial by jury begun, Count 1 dismissed by Government March 9, 1949.
4. Trial proceeded March 10 and 11, 1949.
5. Trial concluded; Verdict Guilty; defendant released on bond of $2,000.00, motion for new trial to be filed by March 21, 1949, entered March 14, 1949.
6. Verdict of Guilty filed March 14, 1949.
7. Defense motion for judgment of acquittal or for new trial filed March 21, 1949.
8. Supplemental motion of defendant for acquittal or new trial filed May 5, 1949.
9. Order allowing withdrawal of G. A. Ohlinger as counsel for defendant and overruling motion and supplemental motion of defendant, entered May 6, 1949. Kloeb, J.
10. Judgment and Commitment filed and entered. 18 months; bond released, clerk to refund $2,000.00 to defendant; motion to admit to bail pending appeal denied. (Defendant elects not to begin service of sentence.) Noted May 6, 1949.
11. Notice of appeal filed in duplicate.

Attest:

C. B. Watkins, Clerk,
J. A. Green, Deputy Clerk.

Dated: May 6, 1949.

DESIGNATION
(Filed May 13, 1949)

Defendant through counsel designates the following portions of the record for printing and docketing with the U. S. Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio:

1. Indictment for violation of Section 12(a), Selective Service Act of 1948, filed January 4, 1949.
2. Transcript of record of trial and charge to jury.
3. Verdict of Guilty filed March 14, 1949.
4. Defense motion for judgment of acquittal or for new trial filed March 21, 1949.
5. Supplemental motion of defendant for acquittal or new trial filed May 5, 1949.
6. Order allowing withdrawal of G. A. Ohlinger as counsel for defendant and overruling motion and supplemental motion of defendant, entered May 6, 1949.
7. Judgment and Commitment filed and entered. 18 months; bond released, clerk to refund $2,000.00 to defendant; motion to admit to bail pending appeal denied. (Defendant elects not to begin service of sentence.)
8. Notice of appeal filed in duplicate.

Stanley U. Robinson, Jr.,
Francis Heisler,
Attorneys for Larry Gara.

Dated May 11, 1949

Copy mailed to Mr. Openlander, Ass't. U. S. Attorney, Toledo, Ohio.

GOVERNMENT EXHIBIT No. 1
(Filed March 14, 1949)

Selective Service System
REGISTRATION CARD

1. Name Rickert Charles Ray
2. Place of residence Ropp Hall, Bluffton, Ohio
3. Mailing Address Same
4. Name and address of person who will always know you address Refuses to answer
5. Date of birth Refuses 1927
6. Place of birth Refuses to answer
7. Occupation Refuses to answer
8. Firm or individual by whom employed Refuses to answer
9. Nature of business, service rendered, or chief product Refuses to answer
10. Place of employment or business Refuses to answer
11. Local board with which registered under Selective Training and Service Act of 1940, as amended Refuses to answer (Did register)
12. Were you ever rejected for service in the armed forces? Refuses to answer
13. Marital status: Refuses to answer
14. Active duty in the armed forces of the United States or a cobelligerent nation since Sept. 16, 1940: Refuses to answer
15. Present membership in a reserve component of the armed forces: Refuses to answer

I affirm that I have verified the foregoing answers and that they are true: Refuses to sign
Date of Registration September 10, 1948
Registrar for local board 2 Lima, Ohio

GOVERNMENT EXHIBIT No. 2A
(Filed March 14, 1949)

Bluffton, Ohio,
November 15, 1948.

I, Larry Gara of Ropp Hall, Bluffton, Ohio, voluntarily make this statement to William W. Stickle and William E. Tootell, whom I know to be Special Agents of the Federal Bureau of Investigation, having been told by them that I do not have to make any statement and that anything I say may be used against me in a court of law. I have also been advised of my right to be represented by a lawyer. No threats or promises of any kind have been made to induce me to make this statement:—

I was born on May 16, 1922 at San Antonio, Texas.

At 8 p. m. on or about August 25, 1948 I made a speech at a special meeting on Civil Disobedience held at the Friend's Meeting House located on North Sixth Street between Walnut and Washington Streets in Reading, Pennsylvania. This was an open meeting with people of all ages present. There appeared to be men present of legal draft age—ages 18 to 25, but I do not know the names and addresses of any of them.

I made this speech for the specific purpose of aligning myself with those men who were refusing to register under

GOVERNMENT EXHIBIT No. 2B
(Filed March 14, 1949)

the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. In making this speech I intended to violate the Selective Service Act.

On November 8, 1948 I told Charles Ray Rickert of Ropp Hall, Bluffton, Ohio, "Stand by your principles, don't let them coerce you into registering." I made the above statement in the presence of Special Agent Tootell and a Deputy Sheriff of Allen County. At the time I made the above statement I knew Rickert was of draft age and that he had already refused to register for Selective Service on September 10, 1948.

Following the passage of the Selective Service Act of 1948 I signed an open letter entitled, "A Call to American Christians of Draft Age" published by the Peacemakers of 2013 Fifth Ave., New York 35, N. Y. This open letter advocates refusal to register for the draft.

GOVERNMENT EXHIBIT No. 3
(Filed March 14, 1949)

PEACEMAKERS, Mt. Morris House
2013 Fifth Ave., New York 35, N. Y.

I am in agreement with the Open Letter. I shall do what I can to spread its message. If a youth of draft age, I plan not to register or serve under the Draft; if not, I shall in every way possible assist and support Non-registrants.

NAME .....
CHURCH AFFILIATION ... .
ADDRESS .....
.....
AGE ..... DATE .....

GOVERNMENT EXHIBIT No. 7
(Filed March 14, 1948)

COPY

Ropp Hall
Bluffton College
Bluffton, Ohio
September 30, 1948

Attorney General Thomas Clark
Department of Justice
Washington, D. C.

Dear Sir:

I was recently shocked to learn that a young man, Ralph E. Cook, a conscientious objector to war and conscription was sentenced to two years in prison for refusing to register for the draft law.

Government Exhibit No. 7

My wife and I have been publicly and openly advocating that Christians should disobey the draft law and will encourage any young man that we know is taking this position. We believe it is the Christian thing to do and have made known in many instances that those are our feelings. If the law is to be strictly enforced then we, too, should be prosecuted as well as the three hundred ministers who also advocate this position of disobeying the draft law in obedience to a higher moral law. Why should the Department of Justice discriminate and choose to punish only a few of the younger objectors when many of us older people are also violating the law by openly advocating such action. If it is the aim of your department to merely break the spirits of such young men then our country has stooped to the degenerate practices of other totalitarian states by attempting to force men by severe punishment to abdicate their Christian principles for obedience to the nation state. Such practices differ only in degree from those used in Germany, Russia and other totalitarian countries, and are an indication that democracy is no longer a guiding principle with our governmental leaders. I trust that this is not the case and that Cook and other brave idealists like him will be given their freedom instead of a branding of criminal action. These men do not choose to go to prison but the government chooses to put them there. It cannot be too strongly emphasized that the imprisonment of such young Christian idealists will never prove to the peoples of the world that we are a freedom loving country.

Sincerely,

/s/ Larry Gara
Larry Gara

(Received Oct. 4, 1948. Office of the Attorney General.)

GOVERNMENT EXHIBIT No. 8
(Filed March 14, 1949)

COPY

Ropp Hall
Bluffton, Ohio
November 8, 1948

The Federal District Attorney
Federal Court Building
Toledo, Ohio
Dear Sir:

We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.

This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government seems to us a terrible break with our American heritage of freedom. If one believes that war and conscription for war are crimes against humanity then he has a moral obligation to reject these practices and obey the moral law as he sees it. If the course that Charles and others like him have chosen is a criminal one, then we should also be prosecuted for committing a breach of law. However, we do not believe that this is a criminal act and feel that the government should reject the idea of punishment in these cases. If our gov-

ernment continues to punish men of conscience then we shall do everything in our power to identify ourselves with these men and tell every American citizen of the persecution for righteousness' sake that is taking place in our land.

Sincerely yours,

/s/ Larry Gara
Larry Gara
Instructor in History
Bluffton College.
/s/ Lenna Mae Gara
Lenna Mae Gara
(Mrs. Larry Gara)

GOVERNMENT EXHIBIT No. 9
(Filed March 14, 1949)

COPY

Ropp Hall
Bluffton College
Bluffton, Ohio
November 12, 1948

United States District Attorney
The Federal Court Building
Chicago, Illinois
Dear Sir:

I have just learned of the arrest of Claire Street, a student at the University of Chicago who, as a conscientious objector to war and conscription has refused to register

for the draft. I have known Claire for years and had the privilege of rooming with him when he was a student at William Penn College, Oskaloosa, Iowa. I feel that it would be a crime for our country to imprison a young idealist like Claire.

This problem especially concerns me since my wife and I would both refuse to register for the draft if we were asked to do so. I have publicly advocated this position and shall continue doing all in my power to further the cause of civil disobedience in this country. We believe that the draft is unChristian and should be disobeyed by those who take their Christianity seriously. If Claire is guilty of violating the law then I, too, am guilty for I have advocated disobedience to the law and have supported men who take this position.

This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government, seems to us a terrible break with the American heritage of freedom. If one believes that war is a crime against humanity then he has a responsibility to reject war and war preparation and follow the rules of the moral law instead of the law of the government. If the course that Claire Street and others like him have taken is criminal then I should also be prosecuted for committing a breach of law. However, I do not believe that this is a criminal act and feel that our government should reject the idea of punishment in these cases. If our government continues to punish men of conscience then I shall do all in my power to identify myself with these men and tell every American citizen of the persecution for righteousness' sake that is taking place in our land.

Sincerely yours,

/s/ Larry Gara
Larry Gara

DEFENDANT'S EXHIBIT D
(Filed March 14, 1949)

INDICTMENT

The grand jury charges that:

On or about the 10th day of September, 1948, at Lima, within the Northern District of Ohio, Western Division, Charles Ray Rickert, being a male citizen of the United States, and being approximately twenty-one (21) years of age, failed and refused to comply with the provisions of the Selective Service Act of 1948, in that he refused to comply with the provisions of such Act by registering as therein provided, and in that he refused to answer certain questions put to him by the members of Local Draft Board No. 2 at Lima, Ohio, such information being required for proper registration of individuals under the provisions of such Act.

A True Bill.

Beatrice Spieker, Foreman.

Gerald P. Openlander
Assistant United States Attorney

DEFENDANT'S EXHIBIT E
(March 14, 1949)

JUDGMENT AND COMMITMENT

On this 20th day of January, 1949, came the United States Attorney, and the defendant Charles Ray Rickert, appearing in proper person, and having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the court replied that he did not and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to-wit: Refused to register under the provisions of the Selective Service Act of 1948, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the court, it is by the court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Eighteen (18) months.

It now appearing to the court that the conditions of the bond given herein have been fully complied with, it is therefore ordered that the clerk refund to the defendant the sum of $1,000.00 heretofore deposited in the registry of the court in lieu of surety on said bond.

It is further ordered that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Frank L. Kloeb,
United States District Judge.

The court recommends commitment to Milan, Mich.

DEFENDANT'S EXHIBIT G
(Filed March 14, 1949)

Claiming he is opposed to military service, a young man in Allen-co eligible for registration under the selective service law has refused to sign up even though he may be exempt from service.

This was revealed Thursday by O. O. Barr, chairman of the Selective Service board, who said the man's case would be turned over to the U. S. District Attorney at Toledo for action.

Barr said the 21-year-old man appeared at draft headquarters and told registrars he would not sign up this time altho he had registered during the wartime draft. He said he was now studying for the ministry.

Informed of the possible penalty for not registering the man said he was aware of it before he called at board headquarters. All men between the ages of 18 to 25 inclusive are required to register even though they may not be eligible for a call. Failure to do so may result in a fine up to $10,000 or a five-year prison sentence or both.

The board also reported Thursday that 256 more men registered Wednesday to raise the total to date to 4,750. Saturday is the last day scheduled for registrations. Men 18 years old are to sign up Friday and Saturday.

ORDER

This matter coming on for consideration on the application of the defendant-appellant herein for an extension of time within which to file the certified printed transcript of record in the United States Court of Appeals, the application is granted and

It is ordered that the time within which the certified printed transcript of record on appeal is to be filed in the United States Court of Appeals be and it is hereby extended to July 15, 1949.

Frank L. Kloeb
May 8, 1949 United States District Judge.

CERTIFICATE OF CLERK

Northern District of Ohio
Western Division, ss.

I, C. B. Watkins, Clerk of the United States District Court within and for said District, hereby certify that the foregoing printed pages contain a full, true and complete copy of the record in this cause; in accordance with the designation for record on appeal filed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court at Toledo, in said district, this ..... day of May, A. D. 1949.

C. B. Watkins, Clerk,

J. A. Green, Deputy Clerk.

TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CAUSE ARGUED AND SUBMITTED OCTOBER 20, 1949.

Before Simons, Allen and McAllister, Circuit Judges.

This cause is argued by Francis Heisler and Stanley U. Robinson, Jr., for appellant and by Gerald P. Openlander for appellee, and is submitted to the court.

Judgment entered November 28, 1949.

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION.

Filed November 28, 1949.

Before Simons, Allen and McAllister, Circuit Judges.

Allen, Circuit Judge. Appellant attacks a judgment rendered on a verdict finding him guilty under Title 50 U. S. C. App., § 462 (a) [1] of knowingly counseling and

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[1] Section 462 (a). "Any * * * person * * * who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title * * * shall, upon conviction * * * be punished by imprisonment * * * or a fine * * * or by both such fine and imprisonment. * * *"

aiding and abetting one Charles Ray Rickert to refuse or evade the registration required by the Selective Service Act of 1948, Title 50 U. S. C. App., § 451 et seq. Section 453, the registration section, in its material portion reads as follows:

> "Except as otherwise provided in this title * * *, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

Section 453 must be read in conjunction with § 611.6 (d) of the Regulations promulgated by the President on July 20, 1948, in Executive Order 9979. The Regulation provides:

> "(d) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be."

Rickert first refused to register on September 10, 1948. On November 8, 1948 he was arrested on the campus of Bluffton College, Bluffton, Ohio, where he was a student. Appellant, dean of men at Bluffton College, had himself refused to register in the First World War and considered it his religious duty to oppose all forms of cooperation with war. He was present when Rickert was arrested. Government witnesses testified, among other things, that appellant said to Rickert at that time, "Do not let them coerce

you into registering." Appellant states that he said, "do not let them coerce you into changing your conscience; your mind, it may have been; I don't know exactly." It was also shown that on November 8, 1948, appellant and his wife addressed a letter to the "Federal District Attorney" at Toledo, Ohio, which in part reads as follows:

> "We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position."

Similar letters were addressed by appellant about this time to the Attorney General of the United States and to the District Attorney at Chicago.

Appellant also signed a pledge in 1948, stating, "I shall in every way possible assist and support Non-registrants." Evidence was presented to the effect that at a meeting held in Reading, Pennsylvania on August 25, 1948, he advocated that men of draft age refuse to register under the Selective Service Act of 1948, and stated, "In making this speech I intended to violate the Selective Service Act."

Since Rickert, at the time of his arrest, did not in words decline to register on November 8th, it is contended that his offense was complete on September 10, 1948. Appellant therefore urges that his advice on November 8th that Rickert should not permit himself to be coerced into changing his mind, could not affect Rickert's action nor

constitute a violation of the statute; that the indictment does not properly charge the offense, and that the evidence does not sustain the conviction.

These contentions are untenable. Rickert's failure to perform his obligation to register constituted a completed offense on September 10th, but it was repeated on every day thereafter during the period involved herein, for he was under a continuing duty to register. Regulation 611.6 (d), above quoted, establishes this duty. Since § 453 authorizes the President to fix the "time or times" of registration the statute is not, as contended, enlarged by the Regulations. Section 611.6 (d), since it conforms to the express provision of § 453, is valid. It follows that Rickert on November 8, 1948, was under the obligation to register. He refused by his actions, although not by express words, to fulfill this obligation, and appellant encouraged him in so doing. The indictment specifically charged the offense as of that day, and the charge was proved by substantial evidence.

The fact that appellant sincerely believed that it was his Christian duty to oppose registration does not absolve him from his violation of the statute. The rights of religion are not beyond limitation. Davis v. Beason, 133 U. S., 333; Prince v. Massachusetts, 321 U. S. 158, 166. The guaranty of freedom of religion in the Bill of Rights is not a guaranty of immunity for violation of law. Baxley v. United States, 134 Fed. (2d) 937 (C. A. 4); Reynolds v. United States, 98 U. S. 145. It is to be observed that § 456(j) of the Selective Service Act makes adequate provision for the protection of persons who by reason of religious training and belief are conscientiously opposed to participation in war, in any form; but they are required to register in order to claim exemption from combat duty or from non-combatant service.

The District Court did not err in charging that it was immaterial whether appellant succeeded in dissuading Rickert from registering. Ever since the decision in Schenck v. United States, 249 U. S. 47, 52, it has been the law that where an attempt to obstruct military service, as well as actual obstruction, is penalized by statute, there is "no ground for saying that success alone warrants making the act a crime." It is immaterial, therefore, whether appellant did or did not make a practice, as he contends, of counseling only those who were "inwardly fixed" in their conscience to refuse to register. Under § 462, the gist of the crime is the counseling, aiding or abetting the violation, and not the result.

Also the District Court properly charged that it was not necessary to prove that appellant actually brought about Rickert's violation of the statute if his words were used in such circumstances and were of such a nature that they would have a tendency to cause Rickert to refuse to register. Butler v. United States, 138 Fed. (2d) 977 (C. A. 7); United States v. Pelley, 132 Fed. (2d) 170, 177 (C. A. 7).

Nor do we think that appellant's argument that the Selective Service Act violates his constitutional right of free speech on the ground that it restricts freedom of speech and that there is no clear and present danger (Cf. Terminiello v. Chicago, 337 U. S. 1) justifying such restriction, can be sustained. The cited case involved an ordinance which as construed by the trial court directly invaded freedom of speech. The Selective Service Act does not even purport to enter the field of restriction of speech or of publication. On the question whether a clear and present danger existed requiring the enactment of the statute, the Congress is the judge. It has the obligation,

under the Federal Constitution, of providing for the common defense. In the preamble to the Selective Service Act of 1948, under the congressional declaration of policy it is stated "The Congress * * * declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation." We take judicial notice of the existence of the so-called "cold war" which in the view of the Congress necessitated this peacetime draft.

The vital consideration which compels us to overrule appellant's contention on this point is that § 462 forbids any person to counsel others to violate a statute which neither affects nor relates to freedom of speech or opinion. Section 453, the provision immediately involved here, simply establishes the duty of registering. It is self-evident that violation of § 462, particularly as to aiding and abetting, might be consummated without any expression of opinion. Even counseling not to register, which would constitute a verbal act, might on many occasions not involve an expression of opinion with reference to the Selective Service Act. The problem presented here arises out of the fact that appellant, in addition to counseling Rickert not to fulfill his continuing duty to register, expressed opinions as to the propriety of the law and the policy of a peacetime draft. If uttered under other circumstances these views might well have been protected by the First Amendment. Appellant could freely oppose the Selective Service Act both in public and private, in peacetime, and in wartime (Cf. Taylor v. Mississippi, 319 U. S. 583) and demand its repeal. Therefore appellant contends that since his counseling of Rickert was based on conscientious opposition to the law, and expressed opinion was part of the basis of his admonition to Rickert, he can not be found guilty as charged.

It is true that the trend of former decisions penalizing opposition to policies of the Government has been greatly modified in recent years. See Gilbert v. Minnesota, 254 U. S. 325; United States v. Schwimmer, 279 U. S. 644; Minersville School District v. Gobitis, 310 U. S. 586, as compared with Schneider v. State, 308 U. S. 147; Taylor v. Mississippi, supra; Terminiello v. Chicago, supra; Girouard v. United States, 328 U. S. 61. But the decisions relied on by appellant do not arise out of cases where the accused counseled others to commit violations of express law, the counseling being also expressly forbidden by statute. No decision has been handed down by the Supreme Court holding that violation of an express statute enacted by the Congress in the exercise of its constitutional power to provide for the common defense is excused under the First Amendment because the acts of violation are consummated, as counseling always must be, through the medium of words.

The case argued by appellant in many ways is based upon a different set of facts from those presented here. We do not have a mere attempt on appellant's part to comfort or give moral support to some one who is paying the penalty for his refusal to register. Here appellant admits that he agreed in every way possible to assist and support non-registrants. At an open meeting he advocated refusal to register. His repeated letters state that he counseled men of draft age to refuse registration. Such actions, if carried out extensively, might well nullify the law. Appellant may attack the Selective Service Act of 1948 from every platform in America with impunity, but he cannot, under the guise of free speech, nullify it by disobedience to its express provisions.

We conclude that the statute is constitutional, and in this case constitutionally applied.

The judgment is affirmed.

PETITION FOR REHEARING.

[Filed December 19, 1949.]

May It Please the Court:

Comes now, Larry Gara, defendant-appellant, by his attorneys Francis Heisler and Stanley U. Robinson, Jr. and petitions that a rehearing be allowed in the above-entitled cause, or that the finding of the court be modified and changed; and as grounds therefor, he respectfully submits that this Honorable Court overlooked certain parts of the record and misapprehended others, as we shall hereinafter show.

I.

This court erroneously found that the appellant was not convicted for giving moral support to another.

On page 5 (beginning with the third paragraph) of this court's opinion it is stated:

> "The case argued by appellant in many ways is based upon a different set of facts from those presented here. We do not have a mere attempt on appellant's part to comfort or give moral support to some one who is paying the penalty for his refusal to register. Here appellant admits that he agreed in every way possible to assist and support non-registrants. At an open meeting he advocated refusal to register. His repeated letters state that he counseled men of draft age to refuse registration."

As against the opinion expressed, we respectfully point to the record—particularly to pages 166 and 167 from which it will appear abundantly clear that on the basis of the Trial Court's instructions the appellant could,—nay,—he had to be convicted for the "mere attempt on appellant's

part to comfort or give moral support to someone who is paying the penalty for his refusal to register", and who prior to the time of receiving such moral support, advised his Draft Board of his irrevocable decision not to register.

We do not believe that this court concluded that just because "Appellant admits that he agreed in every way possible to assist and support non-registrants", that therefore he may be found guilty under the Act. We rather assume that this court felt that the appellant advocated refusal at open meetings and in his letters. And yet the only evidence bearing upon the advocacy of refusal to register, was admitted for one purpose only, i. e., to show "knowledge". We point to the Trial Court's instructions, where it was said:

> "In the trial of this case, the court has permitted reference to a speech made by the defendant in the State of Pennsylvania on or about the 25th of August, 1948, the reference coming before us by way of an admission made by defendant to government witnesses. The Court has permitted the introduction of a pledge slip or declaration of the defendant, after proper identification, as a paper writing in which the defendant is said to have pledged a certain course of conduct; and the court has admitted these letters written by defendant and addressed to government attorneys. At the time this evidence was admitted, the court specifically charged the jury that *they were to consider this evidence only as it bore upon the question of the intent of the defendant*, because it is charged that he 'knowingly counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948'." (TR 166) (Emphasis supplied.)

The Trial Court also instructed the jury that:

> "You will therefore consider this *evidence as having been admitted only for the purpose of enabling the jury to obtain some index into the mind of the defendant on*

> *the question of his intent* when it is charged that he knowingly counseled, aided and abetted another person to refuse or evade registration" (TR 167). (Emphasis supplied.)

From the above instructions, and particularly from those parts which we emphasized, it is clear that appellant's "advocacy" of non-registration in Pennsylvania, or through his letters, was nothing but an "index into the mind," of appellant to determine whether or not he did "knowingly" counsel Rickert not to register.

It cannot be in fairness stated that this index into appellant's mind would show that he counseled others not to register, but rather on the basis of the record, it is apparent that he did knowingly counsel those who were *inwardly prepared* to stand by their religious convictions which prompted them not to register. That such was the case, it is apparent from the excluded evidence (Tr. 84), by means of which appellant attempted to prove that when he concluded that the registrant was not prepared inwardly to stand by his conviction, he in fact counseled him to register.

We believe that in face of the facts that the Trial Court admitted appellant's prior speech and his letters, only for the purpose of proving intent, the conviction cannot be upheld on such prior letters, nor on the prior speech, if they were to stand alone. There was need for a further instruction which permitted—in fact directed—the jury to convict the appellant in case they find that *he merely gave comfort or support to a man who had already made up his mind not to register, and who had so notified his Draft Board prior to the time when appellant gave such comfort and support.*

This above contention is supported by the further instruction of the Trial Court wherein it is stated "In further analyzing the count of the indictment, you will note that it provides that Larry Gara knowingly counseled, aided and abetted. To counsel means to advise, to give advice to, to offer an opinion as worthy or expedient to be followed. The words "aiding" and "abetting" are not synonymous. To abet is to encourage, counsel, incite, or intimidate the commission of a crime. *To aid is to support*" (Tr. 168). We respectfully submit that an instruction to the jury stating that "to aid is to support" does not square with this court's opinion that in the instant case "we do not have a mere attempt on appellant's part to comfort or give moral support to someone who is paying the penalty for his refusal to register." If we understand this latter statement, we understand it to mean that this court would not uphold a conviction of appellant if he merely comforted or gave moral support to someone who is paying the penalty for his refusal to register. (We may assume that Rickert at the time when he was arrested and when appellant's comforting words were directed to him, already began to pay the penalty for his refusal to register.) In any case, it is hard, if not impossible, to maintain that the jury did not convict appellant simply because they were instructed that "to aid is to support."

We maintain that this Honorable Court overlooked the fact that the Trial Court instructed the jury to convict appellant even though he did merely what this court said would not be sufficient for a conviction. The Trial Court said:

> "*It is the apparent contention of the defendant that he did not counsel*, aid or abet Rickert in his refusal to register on September 10, 1948, but *merely that he supported him in his attitude* after he, Rickert, had

decided in his own mind not to register because of his religious beliefs or the dictates of his own conscience. * * * *You are instructed that if what the defendant knowingly said to Rickert* on the 8th day of November, 1948, under the circumstances then and there present, *was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register* under the Selective Service Act of 1948, whether or not it actually had that effect, *it would constitute an offense* within the meaning of this Act, as charged in the second count of the Indictment" (Tr. 169). (Emphasis supplied.)

Taking the foregoing instruction as a whole and juxtaposing the contention of Appellant that he "merely supported" Rickert with the direct reference to the accomplishment of the offense, it becomes immediately clear that the jury had to conclude that their duty is to convict appellant even though he did nothing more than subsequently support Rickert in his decision of non-registration.

To sum it up, it may be justly inquired, is it possible to conclude that the appellant was to be convicted for a mere attempt on his part to give comfort or moral support "to someone who is paying the penalty for his refusal to register." Under the instructions, we maintain that the jury felt it its duty to do so, but in any case, it was a possibility for the jury so to understand the instructions; and it is the further possibility that that was the basis of the guilty verdict. And, if such is the case, then we believe that under the opinion of this court, the conviction ought to be reversed.

As it was pointed out in our original brief the instructions of the Court are clearly restrictive of Freedom of Speech. The interpretation of the Trial Court as presented in the instructions runs contrary to the prior decisions as to the strict interpretation of criminal statutes. We fur-

ther submit that the Trial Court erred in not giving the requested instructions concerning the vagueness of the statute involved and thus prejudicing appellant greatly.

II.

The conviction of appellant on this record in effect nullifies the First Amendment to the Constitution.

This court in the concluding paragraph on page 6, emphasizes the opinion that:

> "Appellant may attack the Selective Service Act of 1948 from every platform in America with impunity, but he cannot, under the guise of free speech, nullify it by disobedience to its express provisions."

We are trying hard and we confess our inability to find the line which this court apparently attempts to draw on one side of which a speech is protected by the Constitution, while on the other it is a punishable act because it is disguised as freedom of speech. We may not be considered in error when we conclude that this court likely draws the line because it has taken, "Judicial notice of the existence of the so-called 'cold war'."

We are much afraid that if freedom of speech can be restricted because of the various degrees of coldness and hotness of the war, then freedom of speech in fact does not exist. We do not hope that that is the case, nor do we state that that is what this court meant in its opinion. We rather believe that the law is still as it was expressed by the Supreme Court of the United States that:

> "This court has characterized the freedom of speech and that of the press as fundamentally personal rights and liberties. The phrase is not an empty one and was not lightly used.

> "In every case therefore, where legislative abridgment of the rights is asserted, the court should be astute to examine the effect of the challenged legislation. Mere legislative preferences on beliefs respecting matters of public convenience may well support regulations directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." (*Schneider v. Irvington*, 308 U.S. 147.)

We believe that the latter part of the above opinion is squarely at variance with the opinion of this court in stating that "the so-called cold war, which in the view of the Congress necessitated this peacetime draft;" and would make it mandatory to inquire into the Constitutionality of Section 462, Sub-Paragraph (a) of the Act which this court assumes *ab initio* to be Constitutional.

That we justly submitted to this court the inquiry to determine the Constitutionality of Section 462-a is apparent when we read that:

> "*The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.* One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (Emphasis supplied.)
> *Board of Education v. Barnette*, 319 U. S. 624.

If we read the above opinion correctly—and we believe that we do,—then it means one thing; that Congress is not justified to breach freedom of speech just because officials of our government feel that there is a "cold war", as is so euphemistically referred to by our "all-knowing" newspapers. The cases above cited and those appearing in our

original brief, and particularly the case of *United States v. Ballard*, 322 U. S. 778; 64 S. Ct. 882 demonstrate to us that the Supreme Court, while agreeing with this Honorable Court that Congress has the right to maintain adequate armed strength for the security of the nation, also hold that that must be done without invading the province of the First Amendment.

We submit that on the basis of the cases cited in our original brief; particularly *Girouard v. United States*, 328 U.S. 61; *Bridges v. California*, 314 U.S. 252 and *Terminiello v. City of Chicago*, 69 S.Ct. 894, the precept of "Clear and Present Danger" ought not and cannot be restricted because of the presence or absence of a "Cold War."

Conclusion.

Appellant respectfully submits that on the law and in the interest of principled interpretation of the Constitution, the opinion of this Court ought to be modified and changed and the conviction ought to be reversed.

Respectfully submitted,

FRANCES HEISLER,
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STANLEY U. ROBINSON, JR.,
Attorneys for Appellant.

December 6, 1949.

Attorney's Certificate.

The undersigned, being the attorneys for defendant-appellant Larry Gara, do hereby certify that the above petition for a rehearing is well-founded in law and is not submitted for delay.

FRANCIS HEISLER,
STANLEY U. ROBINSON, JR.,
Attorneys for Appellant.

ORDER DENYING PETITION FOR REHEARING.

[Filed January 16, 1950.]

The petition for rehearing is denied.

[fol. 217] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
FEB 15 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

FEBRUARY TERM, A. D. 1950.

No. [redacted] 19

LARRY GARA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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Points Raised in Petition:

I. The Selective Service Act of 1948, Section 12(a) thereof was interpreted by the Trial Court and by the Court of Appeals in a manner that violates petitioner's rights secured by the First Amendment. The interpretation of the Act was such that it did not meet the test of "Clear and Present Danger." The section is indefinite and vague, contrary to the rules pertaining to Criminal Statutes. The section as it is applied to petitioner, is contrary to the United States Constitution when enacting Universal Military Training in peacetime. 4, 5

II. The instructions of the Trial Court upheld by the Court of Appeals interpreting the Selective Service Act of 1948 is unconstitutional as being too indefinite and vague in its terms. It was not strictly construed in favor of the petitioner who stood charged with a criminal offense. The instruction embodying the phrase "tendency to encourage" is contrary to the rulings of this Court in prior cases 5

III. The regulations under the Selective Service Act of 1948, which attempts to establish a "continuing duty for registrants, is unconstitutional."... 5

IV. Petitioner is deprived of his Constitutional rights when he was convicted of counselling a non-registrant who irrevocably decided not to register, prior to his meeting petitioner. The non-registrant did "present himself for and submit to registration" and, therefore, he committed no crime and as a further consequence, petitioner cannot be guilty of a crime either. Petitioner cannot be constitutionally convicted for giving succor to one who is accused or convicted of a crime 5

V. The act of the non-registrant represents full compliance with the Selective Service Act of 1948, and the regulations thereunder. There was no crime committed by the non-registrant and, therefore, no crime has been committed by petitioner, who is charged as having aided, and abetted the non-registrant 6

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IN THE

Supreme Court of the United States

FEBRUARY TERM, A. D. 1950.

No.

LARRY GARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Larry Gara, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit, which Court affirmed the decision and judgment of the United States District Court for the Northern District of Ohio. The District Court found that when Petitioner, a Quaker and the Dean of Men at Bluffton College, Bluffton, Ohio, (a Mennonite school) told to one Charles Rickert, one of his students who, prior to meeting Petitioner, presented himself to his Local Draft Board and gave

his name and address, but refused to sign his Draft Card or take other affirmative action on religious grounds, that Rickert should stand by his conscience if he was inwardly prepared, Petitioner thereby violated that part of Sec. 12(a), Title I of the Selective Service Act of 1948, which reads:

> "* * * any person * * * who knowingly counsels, aids or abets another to refuse or evade registration or service in the Armed Forces, or any requirements of this Title, or of said rules, regulations or directions, * * * shall, upon conviction * * * be punished by imprisonment for not more than 5 years or a fine of not more than $10,000, or by both such fine and imprisonment." 50 App. U.S.C.A. 462(2).

The decision of the Court of Appeals makes illegal any advice to or expression of sympathy or agreement by a parent, minister, priest, rabbi, doctor, lawyer or teacher, with a person who follows the guidance of his highest moral precept, which precept is religious or secular. The instant case presents something of the issues set forth in *Wirt A. Warren* v. *United States,* now on petition for Certiorari to this Court. The present case, however, goes far beyond the *Warren* case and presents greater and more sinister threats to the Freedom of Speech and Freedom of Religion.

Statement of Matters Involved.

On September 10, 1948, the date set for registration, Charles Ray Rickert, a Divinity student at Bluffton College, appeared before his Draft Board and gave the Clerk his name, address and year of his birth. He refused to give further information or to sign his draft card because, as he stated, such affirmative acts would be contrary to his religious belief. Rickert also stated, orally and in writing, that his decision to contribute nothing affirmative to his registration is irrevocable.

Ten days later, or about the 20th of September, Rickert first met Petitioner, the Dean of Men, at his College. From that date on and up to November 8, 1948, when Rickert was arrested, various conversations were held between the two. They discussed conscientious objections to war; the Christian duty of religious practices, and the need of being inwardly prepared to take the consequences of one's action. Gara, having learned that Rickert was inwardly prepared, approved the latter's act of following the dictates of his conscience. On the date of Rickert's arrest Gara told him "Stand by your convictions. Don't let them coerce you into registering", or "Don't let them coerce you into going against your conscience", or something substantially to the same effect.

The District Court instructed the jury that "to aid is to support", and further, that if what Petitioner said "had a tendency to encourage or cause Rickert to continue his refusal to register" then Gara was to be found guilty (Tr. 168-169).

Petitioner did in the first instance at the trial, and subsequently in the Court of Appeals, raise, among others, the following issues:

1. Petitioner did not commit the crime charged against him. Since Rickert complied with the law Petioner's support of Rickert's stand cannot be held to be criminal. Petitioner lacked criminal intent. The statute merely punishes and the indictment only charged counselling evasion or refusal, and both are silent on continued refusal.

2. Sec. 12(a) of the Act as applied by the District Court is invalid as violating the First Amendment to the Constitution, in that it substituted the test of "tendency" in place of "clear and present danger". This

"tendency" test is void for vagueness. The Act as construed is unconstitutional under Art. I, Sec. 8, and Art. II Sec. 2, and further, it was applied strictly against the Petitioner who was charged with a crime. Under the Court decisions a criminal statute ought to be applied strictly in favor of the accused.

3. Various rulings of the Trial Court were so unfair to Petitioner as to deprive him of due process of law.

The Court of Appeals held that the Act involved was constitutional and that it was constitutionally applied by the District Court. It held that Rickert had *a continuing duty to register,* that Petitioner's words had "a tendency to cause Rickert to refuse to register" and were therefore illegal. It was also decided that Congress was the judge of "clear and present danger" and that the First Amendment to the Constitution did not protect Petitioner from the criminal charge against him.

Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 1254 of U.S.C.A. (Judiciary and Judicial Procedure, Title 28, Ch. 646, Pub. Law 773, 80th Cong.).

The judgment of the United States Court of Appeals Sixth Circuit to be reviewed was entered on November 28, 1948 (see the record filed herewith). A petition for rehearing was denied on January 16, 1950, without an opinion.

Questions Presented.

1. Is the 1948 Selective Service Act, and section 12(a) thereof unconstitutional:

a. As violating rights secured by the First Amend-

ment, and as failing to meet the test of "clear and present danger".

b. As too indifinite and vague for a criminal law affecting rights under the First Amendment and creating a new crime based on words rather than acts.

c. As an enactment for federal universal military training in time of peace contrary to the United States Constitution, Art. I, Sec. 8, Art. II, Sec. 2?

2. Is the 1948 Selective Service Act and Section 12(a) thereof unconstitutional as interpreted by the Court's instructions to the jury:

a. As being too indefinite and vague in its terms and as not being strictly construed as required by law.

b. As applying the "tendency to encourage" test, condemned by this Court as inconsistent with the "clear and present danger" test?

3. Are the Regulations adopted under the Act invalid in so far as they attempt to add (and make violation thereof a crime) a "continuing duty" to present oneself and submit to registration which is not provided or authorized by the 1948 Selective Service Act; thus creating a new crime each moment of non-registration, unprovided for by the statute.

4. Does petitioner's conviction unconstitutionally deprive him of due process of law in violation of Amendments 5, 6 and 8 of the Constitution:

a. In finding him guilty of counselling, aiding or abetting refusal to register when the non-registrant's criminal act, if any, occurred before he met petitioner;

b. In considering the crime as counselling refusal *to* register when the statutory definition is "present himself for and submit to registration", compliance with which occurred;

c. In considering it a crime to give succor to one who refused to register when this Court reversed a conviction for counselling refusal to register?

5. Do the statute and regulations thereunder, properly construed, provide for and require registration by the local draft board of religious objectors who, like Rickert, presented themselves at the board, gave certain information but refused to sign a draft card, so that neither Rickert's nor petitioner's acts are criminal?

Reasons for Allowance of Certiorari.

1. We understand from the information that was imparted to us that there is a wide-spread interest on the part of a great many groups composed of representative men and women who intend to apply to this Court for leave to file Amicus Brief. We are informed that among others, groups desiring to file such Brief are:

The Americn Civil Liberies Union
The American Friends Service Committee
Ohio Council of Ministers, etc.

These groups feel, as petitioner does, that the questions here involved represent far more than the conviction of petitioner, and in fact they represent basic issues awaiting a final determination by this Court.

2. *This case raises important questions of federal law which have not been, but should be, settled by this Court.*

a. **Right of religious leaders, teachers and similar persons to counsel or approve another's following his religious beliefs and conscience, though thereby that other may have violated or may violate a law.**

Here the Court of Appeals has held that a Dean of Men, whose duty is to counsel students, cannot tell such student to follow his conscience without thereby having committed a crime—one of the most dangerous doctrines voiced in

American History, by which the First Amendment is rendered nugatory.

In *Musser* v. *Utah*, 333 U.S. 95, this Court reserved for later determination whether an individual could counsel a known crime (polygamy) and be protected by the First Amendment. The time has come to decide this issue. The right to advocate, though not to incite to immediate criminality, would seem required by the decisions of this Court as in:

Herndon v. *Lowry*, 301 U.S. 242 and earlier cases.
Bridges v. *California*, 314 U.S. 252.
Chaplinsky v. *New Hampshire*, 315 U.S. 568.
Taylor v. *Mississippi*, 319 U.S. 583.
Winters v. *New York*, 333 U.S. 507.
United States v. *C.I.O.*, 335 U.S. 106.
Terminiello v. *Chicago*, 337 U.S. 1.

The First Amendment, guaranteeing the "free exercise of religion" was the product of the struggle for freedom to follow conscience; embodied the expression "according to the dictates of conscience", which was a "natural right", a "moral power higher than the State."

Girourard v. *United States*, 328 U.S. 61, 68.
Board of Education v. *Barnette*, 319 U.S. 624.
Taylor v. *Mississippi*, 319 U.S. 583.
Everson v. *Board of Education*, 330 U.S. 1, 34.
See the historical forms of the First Amendment and Congressional discussion, set forth in the brief on certiorari in *Warren* v. *United States*, pp. 33-56.

Can a religious leader, a Dean of students, be branded a criminal for upholding a man in following his "conscience",

for the protection of which the First Amendment was adopted?

Particularly, can a devout Quaker (which it is admitted petitioner is) be branded a criminal for giving that moral aid to those who oppose all war and preparation for war, as a national conference of his faith had required him to do, less than two months earlier in these words:

> "We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretense whatever; this is our testimony to the whole world. The Spirit of Christ by which we are guided, is not changeable, so as once to command us from a thing of evil, and again to move us into it; and we certainly know and testify to the world, that the Spirit of Christ, which leads us unto all truth, will never move us to fight and war against any man with outward weapons, neither for the Kingdom of Christ, or for the kingdoms of this world * * * Therefore we cannot learn war any more. (George Fox and others—founders of the Society—from a Declaration presented to Charles II, 1660)
>
> "Friends are exhorted to adhere faithfully to this testimony against all wars and fighting, and in no way to unite with any warlike measure such as a Selective Service Draft or Universal Military Training, to the end that we may convincingly demonstrate a more excellent way of settling conflicts. * * *
>
> "A living concern having been expressed that Friends' practices be consistent with their professions, Friends are urged:
>
> "1. *To support Young Friends and others who express their opposition to conscription either by non-registration,* or by registration as conscientious objectors. We warmly approve civil disobedience under Divine compulsion as an honorable testimony fully in keeping with the history and practices of Friends * * *
>
> —By a called Meeting representing Friends in the United States, held at Earlham College, Richmond, Indiana, July 20-22, 1948."

b. Interpretation of sections 3 and 12(a) of the Selective Service Act of 1948.

The 1948 Act reads in part: "Any person who knowingly counsels, aids, or abets another to *refuse* or evade registration" (shall be punished as provided in the Act). The 1940 Selective Service Act omitted the words "refuse or". There is no evidence here of counselling evasion. Under the 1940 Act, this Court held in *Keegan* v. *United States,* 325 U.S. 478 that to counsel refusal of military service was not criminal. This Court did not state whether addition of the word "refusal" to the statute could constitutionally be made. Thus, in view of the changed wording of the 1948 statute, this is a case of first impression.

There is a conflict between the decisions of the several Circuit Courts as to the meaning of the requirement that a person subject to the draft "present himself for and submit to registration." This case, indirectly, holds that where a man presents himself at the local board, gives his name, address and age but will not sign his draft card, he has not complied with the statute. The Court of Appeals, Second Circuit (L. Hand, Swan and Clark, C. Js) in the only case which has thus far directly presented this issue, held in *United States* v. *Norton,* January 19, 1950 (not yet reported) that Norton, who did exactly what Rickert did in this case, had complied with the law. Neither the statute nor the regulations made it an offense to *refuse* to sign the card. Regulation 642.31 expressly provided that if a registrant *refuse* to give information or *refuse* to sign his name, the Board shall get the information from other sources, shall sign his name for him and shall complete the registration. The Court there said: "The regulation having provided a substitute for the registrant's signature we believe that the substitute was meant to serve for all purposes,

including the condoning of the refusal * * * We conclude that the crime for which he was indicted was not proven." By its final footnote warning the Court seemed to believe that religious objectors were not "willful" violators of the law and should not be prosecuted. If Rickert was guilty of no crime in this case, petitioner was not.

Taylor v. *Mississippi,* 319 U.S. 583, holding that since refusal to salute the flag was not a crime under *West Virginia* v. *Barnett,* 319 U.W. 624, counselling refusal to salute should be no crime.

Section 3 of the Act states that men shall present themselves "at such time or times and place or places, and in such manner as shall be determined by proclamation of the President and rules and regulations prescribed hereunder." (USC 50, App., sec. 452). By proclamation of the President of June 20, 1948, dates were set from August 30th to September 20th, 1948, for registration of separate age groups. On the date fixed for his age group Rickert presented himself to his local board, and it was then that whatever refusal he made was completed. Regulations were also promulgated under the Act, Reg. 611.6(d) of which provides:

> "The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be."

This regulation is the key to the conviction of petitioner. The lower court appears to hold that what might otherwise be sympathy with a person who had previously broken the law, becomes counselling further law violation because of the continuing duty to register. *This means that the regu-*

lation has made each day of refusal of registration a separate crime, that a person who refused for 30 days would be subject to imprisonment for 150 years and fine of $300.00, *contrary to the obvious intendment of the statute.*

It is fundamental law that only Congress can create a crime and fix its punishment. Congress may provide that violation of administrative rules is a crime; but the administrative agency may not create a crime nor add to the penalties fixed by Congress. Regulation 611.6(d) fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to law:

Viereck v. *United States,* 318 U.S. 236 (1943).
United States v. *Grimaud,* 220 U.S. 506 (1911).
United States v. *Eaton,* 144 U. S. 677.
People v. *Grant,* 242 N.Y. App. Div. 310, 267 N.Y. 508 (1935).
United States v. *L. Cohen Grocery Co.,* 255 U.S. 81 (1921).
Connolly v. *General Constr. Co.,* 269 U.S. 385 (1926).

Even the English rule is to the same effect:

> "The Act may confer the power of making regulations and go on to provide that a breach of regulations so made shall be a punishable offense; but no regulations could themselves create offenses or impose penalties." *M. L. Gwyer,* 5 J. of Pub. Ad. 404, 409.

c. Constitutionality of conscription in 1948.

In *Hamilton* v. *Bd. of Regents,* 293 U.S. 245, 265, this Court left open the power to conscript in time of peace:

> "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace." (293 U.S. 245, 265.)

In the following cases this Court has asserted its right to determine when we are at "peace" for the purpose of determining the validity of various laws and has implied that a different answer may be given as to the type of law involved. Part of the Court considered that a state of war in 1947 was "pure fiction":

Ludecke v. *Watkins*, 335 U.S. 160.
Woods v. *Clyde W. Miller Co.*, 333 U.S. 138.

There has been no determination by this Court when there is a state of peace as to the relationship of the war and militia powers. There is respectable authority that in 1948 Congress did not have the power to conscript and train the *general manpower* of the country but that such power was lodged solely in the states:

"Constitutionality of Peacetime Conscription", 31 Va. L. Rev. 40 (1944).
Constitution, Art II, Sec. 2.
1 Elliot's Debates, 305; 5 Elliot's Debates, 130, 466, 443-5, 464.
United States v. *Miller*, 307 U.S. 174, 179.

The Selective Service Act of 1948 so far as it relates to religious objectors is unconstitutional as prescribing and establishing religion, in violation of the First Amendment. It provides that religious belief requires belief in a "Divine Being", thus making a law "respecting an establishment of religion" contrary to the First Amendment, and thus determining orthodoxy and heresy, contrary to the decisions of this Court in

United States v. *Ballard*, 322 U.S. 78, 86.
West Virginia v. *Barnette*, 319 U.S. 624, 642.

and ruling out of constitutional protection all religions, and there are many, who do not believe in a "Supreme Being".

U.S. v. *Kauten*, 133 Fed. 2d 703.

3. The decision of the Court below is in conflict with the applicable decisions of this Court:

a. The lower Court misapplied the "clear and present danger" test, and if the test were properly applied, the conviction here involved could not be sustained.

The trial court instructed the jury that if they found that Gara's words had a "*tendency* to cause Ricker to refuse to register" Gara should be found guilty. The very inception of the "clear and present danger doctrine" to laws preventing words or speech, was for the purpose of negativing a *tendency* test. The limits to which the "clear and present danger test" has been applied bespeak the utter unlawfulness of the instruction in this case.

Terminiello v. *Chicago*, 337 U.S. 1.
United States v. *C.I.O.*, 335 U.S. 106.
Bridges v. *California*, 314 U.S. 252.
Taylor v. *Mississippi*, 319 U.S. 583.
Herndon v. *Lowry*, 301 U.S. 242.
West Virginia v. *Barnette*, 319 U.S. 624.
Justice Holmes and *Brandeis* in *Whitney* v. *Calif.*, 274 U.S. 357, 375; *Abrams* v. *U.S.*, 250 U.S. 616, 630; *Gilbert* v. *Minnesota*, 254 U.S. 325, 336.
Robert Cushman, "Clear and Present Danger in Free Speech Cases" in *Essays in Political Theory* (Cornell Press 1948).

The Circuit Court also ruled that Congress is the judge of the question whether a clear and present danger existed requiring the enactment of the draft law and presumably the punishment of sincere religious people for following their religion. Such is not the law. Petitioner is entitled

to have the courts review this judgment of Congress and possibly to overrule it.

Thornhill v. *Alabama*, 310 U.S. 88.
Carlson v. *California*, 310 U.S. 106.
West Virginia v. *Barnette*, 319 U.S. 624.

The lower court took "judicial notice" of the existence of the so-called "cold war". Clear and present danger cannot be found by such flimsy methods. The burden of proving clear and present danger was and is on the government.

Busey v. *Dist. of Columbia*, 130 Fed. 2d 592, 319 U.S. 579.

How can the words of sympathy of a Dean of Men to his student in private, after the student has already made up his mind, meet the test that:

> "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges* v. *California*, 314 U.S. 252, 263.

If refusing to salute the flag in time of war (*W. Virginia* v. *Barnette*), if playing anti-catholic records where 90% of the people are Catholics (*Cantwell* v. *Conn.*), if condemning the war and draft to parents of draftees during the war (*Taylor* v. *Miss.*), if the violent, hateful language of Terminiello (*Terminiello* v. *Chicago*) do not present a clear and present danger, *how* can the words "follow your conscience" to a person whose central belief is nonviolence, show such danger? They are not fighting words, sedition, slander nor opprobrium of officers. And above all they are not incitation to violence.

b. Free exercise of religion guaranteed by the First Amendment is a defense to criminal prosecution.

The lower court stated: "The fact that appellant sincerely believed that it was his Christian duty to oppose registration does not absolve him from his violation of the statute." This is contrary to such decisions of this Court as:

West Virginia v. *Barnette,* 319 U.S. 624.

The only allegedly religious acts ever punished as crimes in this country are polygamy, human sacrifice. This Court has itself stated the basic distinction of such cases: (a) the act results in harm to a person other than the government, and (b) the act is contrary to the basic Judeo-Christian culture of our country:

Reynolds v. *United States,* 98 U.S. 145.

Mormon Church v. *United States,* 136 U.S. 1, 49.

West Virginia v. *Barnette,* 319 U.S. 624, 632:

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. * * * The sole conflict is between authority and rights of the individual."

The decision of the Circuit Court in this case gives the lie to the opinion of this Court:

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*W. Virginia* v. *Barnette,* 319 U.S. 624, 642.)

Certainly, acting in the fear of God can render one not a "free agent" and negative criminal intent as effectively as acting in fear of physicial harm:

Respublica v. *McCarthy,* 2 U.S. 86.
People v. *Schmidt,* 216 N.Y. 324, 330-37.
West Virginia v. *Barnette,* 319 U.S. 624.

c. Section 12 (a) of the 1948 Selective Service Law is invalid as too indefinite for a criminal law.

The words "counsels, aids or abets" generally have a technical meaning defining the crime of "accessory". They have been applied far beyond such meaning in this case.

By the statute, one is not to counsel, aid or abet another "to refuse or evade registration or service *in the armed forces.*" Does this cover talking to a conscientious objector who will not be registered or serve in the armed forces?

The statute requires the passive conduct "submission to registration" but it has been applied to require active conduct, "to register".

The statute is intended as a draft act, not an espionage act, but has been applied to policing speech instead of drafting manpower. The instructions to the jury emphasize the fatal vagueness of the statute in making it a crime to give moral comfort to one who has already irrevocably decided his course. The statute is void:

Musser v. *Utah,* 333 U.S. 95.
Winters v. *New York,* 333 U.S. 507.
United States v. *L.. Cohen Grocery Co.,* 255 U.S. 81.
Connolly v. *General Constr. Co.,* 269 U.S. 385.
Herndon v. *Lowry,* 301 U.S. 242.
DeJonge v. *Oregon,* 299 U.S. 353.

The statute as interpreted by the regulations is equally indefinite and void; for the regulations seem to condone what Rickert here did, but they are not so applied:

United States v. *Norton,* CCA 2d, Jan. 19, 1950 (unreported).

M. Kraus & Bros. v. *United States,* 327 U.S. 614.

d. The statute was not strictly construed as required by elementary law.

Hartzel v. *United States,* 322 U.S. 680.

Viereck v. *United States,* 318 U.S. 236.

4. A conflict exists in the decisions of the various Circuits of the Court of Appeals, concerning what constitutes compliance with the statute.

In this case it is indirectly held that Rickert was criminally liable if he appeared at his draft board, gave some information, but refused to sign his card. In the Second Circuit, a unanimous Court (L. Hand, Swan, Clark) in *United States* v. *Norton,* Jan. 19, 1950, held the same acts not criminal. Added weight is given the decision of the Second Circuit by the order of Attorney General Tom Clark to all United States Attorneys, dated May 26, 1949, which states in part: "except in the most willful instances, indictments should not be brought in future of religious objectors who refuse to submit to registration."

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding that Court to certify and to send to this Court, on a day certain to be herein named, a full and complete transcript of the record and all proceedings had in this

case numbered and entitled on its docket 10917, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Sixth Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

LARRY GARA, *Petitioner,*

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February 10, 1950.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Sixth Circuit, Docket No. 10917 was entered on November 28, 1949. Petition for a rehearing was filed within the time provided by the rules of that Court. The Order denying the Petition for Rehearing was entered on January 16, 1950. Both the Opinion and the Order are printed at the end of the record filed herein.

Jurisdiction.

The grounds under which jurisdiction of this Court is invoked are set forth in the Petition preceding this Brief.

Statement of the Case.

The Statement of the Case appears in our Petition and is not repeated here.

Specification of Errors.

The Court of Appeals erred in ruling against Petitioner on each of the issues set forth in his Petition.

Statutes Involved.

The pertinent provisions of the 1948 Slective Service Act and the regulations thereunder are set forth at the end of this Brief.

Argument.

Because of the number of cases cited in the Petition and the Civil Rights questions involved, which are most familiar to this Court, no extended argument is presented here. Considerable material of which this Court would want to be informed in deciding the issues if Certiorari is granted has been omitted. Reference has been made to the Petition and Brief filed in the case of *Warren* v. *the United States of America,* to the October term of 1949, of which Brief a considerable part is pertinent here. We believe that such reference is proper because the counsel in the *Warren* case are two of the counsels herein.

In addition to calling to the Court's attention the great public interest that the issues here involved created in the minds of a great many people we want to add that we consider the implications of the decision of the Court of Appeals of far-reaching importance. We believe, and we so submit, that if the decision of the Court of Appeals is permitted to stand then every minister or spiritual counsellor in general will be precluded from giving succor to any person who committed or stands charged with committing a crime. The importance of the issue as far as our social structure is concerned is apparent. It is apparent because under the decision of the Court of Appeals any person publicly stating that he "does not propose to turn his back on" a convicted friend makes himself as criminally guilty as Petitioner under the general "aid and abbettor" statute 18 U.S.C. 550.

We submit that both the legal and the social implications of the case require that this Court grant a Writ of Cer-

tiorari, and upon hearing of the issues, make its decision known.

Respectfully submitted,

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ADDENDUM.

The Statute Involved.

Selective Service Act of 1948, Secs. 12(a), (462(a), Title 50, App. U.S.C.A.):

"(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (Sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections) or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more

of such offenses, shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *"

Section 6(j) (456(j), Title 50, App. U.S.C.A.):

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political sociological or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant service and training because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. * * *"

Regulation 613.3: "If the registrant is unable, or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word 'Registrar' beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if the registrant had signed his Registration Card (SSS Form No. 1), *and such registrant shall thereby be registered.*"

Regulation 642.31: "a) Provided they are required and have not already been accomplished, the following

steps shall be taken in connection with every man who has registered or who is required to register under the provisions of Title I of Selective Service Act of 1948 (50 App. 98) *immediately upon his reporting to or being brought before a local board* or immediately upon his being taken into custody or his being placed in confinement:

"(1) He shall be registered. (Here follows various specific directives, including:)

"(5) b) If such man is unable or refuses to fill out any form in the manner required by paragraph (a) of this section, such form shall be filled out by a member or clerk of a local board * * * from information gained by interviewing the delinquint and from other sources.

"c) If the signature of such man is required upon any form after it is filled out and he is unable or refuses to sign his name or make his mark upon any such form, a member or clerk of a local board * * * shall sign such man's name and indicate the name of such man."

Regulation 613.11 "(a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) *must* be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card, except when the registrant signs the completed card."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 609

LARRY GARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 201-207) is reported at 178 F. 2d 38.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1949 (R. 201), and a petition for rehearing (R. 208-215) was denied on January 16, 1950 (R. 216). The petition for a writ of certiorari was filed on February 15, 1950. The jurisdiction of this Court is invoked under

28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The questions presented are basically these:

1. Whether one "who knowingly counsels * * * another to refuse or evade registration" under the Selective Service Act of 1948 may be convicted of violating Section 12(a) thereof where the person so counseled had refused to register prior thereto and continued to refuse to register up to the date of the alleged counseling.

2. Whether Section 12(a) of the Selective Service Act of 1948, on its face or as applied in the instant case, is invalid under the First Amendment as an unwarranted restriction of the freedoms of speech and religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604 (50 U. S. C. App., Supp. II, 451), are as follows:

> Sec. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner,

as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder.

* * * * *

Sec. 12. (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

* * * * *

Sec. 611.6(d) of the Regulations issued under the Act, Ex. Order 9979, July 20, 1948, 13 F. R. 4177, provides:

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and

> if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

STATEMENT

The second count of an indictment filed on January 4, 1949, in the District Court for the Northern District of Ohio, charged that the twenty-seven-year old petitioner (R. 190), Dean of Men and professor at Bluffton [Mennonite] College and a Quaker (R. 118, 141-142), on or about November 8, 1948, knowingly counseled, aided and abetted one Charles Ray Rickert to refuse registration, as required by the Selective Service Act of 1948, in violation of Section 12(a) thereof (R. 2).[1]

The evidence adduced at the trial may be summarized as follows:

On September 10, 1948, the date on which he was required to register under the Act, Charles Ray Rickert, a Bluffton College divinity student and a conscientious objector to war and conscription, appeared before the local draft board, gave his name, address, and year of birth, but refused to

---

[1] Count 1 of the indictment, which was dismissed prior to trial, charged petitioner with knowingly counseling, aiding and abetting other individuals whose names were unknown, between June 24, 1948, and November 8, 1948, to refuse or evade registration or service in the United States armed forces and to refuse to comply with the Selective Service Act (R. 2, 3, 177).

give the rest of the information necessary to register him under the Act. In an effort to change Rickert's mind, the board members talked to him, but to no avail. Rickert gave them a letter explaining that as a conscientious objector he refused to register and he did not register thereafter. (Gov. Ex. 1, R. 189; R. 20-27, 92, 97-98, 106-107, 111.) Several days after September 10, upon learning of Rickert's refusal to register and although he was not acquainted with him, petitioner sought Rickert out and, in his own words, "congratulated him and told him that I too would refuse to register; that I had refused to register in the last war; and that we were interested in his position" (R. 123). Subsequently, several times a week until November 8, 1948, the date on which petitioner was charged with counseling Rickert, he discussed the subject of non-registration and conscientious objections with Rickert and told him that he and his wife supported him, wanted to identify themselves with his cause, and wished him luck (R. 58, 101-102, 107, 108-109, 116, 123-126, 138-141, 142-145).

On November 8, 1948, officers who went to the college dormitory to arrest Rickert for refusing to register, met petitioner who, after ascertaining the purpose of their visit,[2] went to Rickert's room

[2] There is a conflict as to what petitioner said to the officers at that time. They testified that petitioner said, "you cannot take Rickert unless you take my wife and me. We are just as guilty as he for we told him not to register." Petitioner and

ahead of the officers (R. 28-29, 55, 61, 69-72, 126). The officers testified that petitioner told Rickert: "Stand by your principles. Do not let them coerce you into registering" (R. 29, 70-71). Rickert testified that petitioner's statement was, "do not let them coerce you into changing your mind" (R. 104, 110), and petitioner was uncertain whether he used the words "your conscience" or "your mind" (R. 127). Subsequently, Rickert was indicted, convicted upon a plea of guilty, and sentenced to imprisonment for 18 months for his refusal to register (Def. Ex. D and E, R. 197-198; R. 94-96, 106).

On November 8, 1948, the date of Rickert's arrest, petitioner wrote the following letter to the United States Attorney in Toledo (Gov. Ex. 8, R. 194-195):

> We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to

---

his wife, who was also present, testified that petitioner said that he and his wife were just as guilty as Rickert because "they took the same position." Petitioner and the F.B.I. agents who interviewed him on November 15, 1948, testified that on that date petitioner denied that he stated on November 8 that he told Rickert not to register and that if he did make such a statement, he must have done it in the heat of excitement, because he did not become acquainted with Rickert until September 20. (R. 28-29, 31, 58-61, 70-71, 76-78, 113, 116, 126, 128.)

do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.

This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government seems to us a terrible break with our American heritage of freedom. If one believes that war and conscription for war are crimes against humanity then he has a moral obligation to reject these practices and obey the moral law as he sees it. If the course that Charles and others like him have chosen is a criminal one, then we should also be prosecuted for committing a breach of law. However, we do not believe that this is a criminal act and feel that the government should reject the idea of punishment in these cases. If our government continues to punish men of conscience then we shall do everything in our power to identify ourselves with these men and tell every American citizen of the persecution for righteousness' sake that is taking place in our land.[3]

[3] Similar letters to the Attorney General and the United States Attorney in Chicago, dated September 30 and November 12, 1948, respectively, protesting against arrests of other young men who had refused to register were also admitted (Gov. Ex. 7, R. 192-193; Gov. Ex. 9, R. 195-196). All these letters were admitted only for the limited purpose of showing intent (R. 47, 166-167).

On November 15, 1948, petitioner made the following voluntary statements to F.B.I. agents who reduced them to writing (Gov. Ex. 2A and B, R. 190-191; R. 30-33, 43, 57-58, 74-81):[4]

> At 8 p.m. on or about August 25, 1948, I made a speech at a special meeting on Civil Disobedience held at the Friend's Meeting House located on North Sixth Street between Walnut and Washington Streets in Reading, Pennsylvania. This was an open meeting with people of all ages present. There appeared to be men present of legal draft age—ages 18 to 25, but I do not know the names and addresses of any of them.
>
> I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. In making this speech I intended to violate the Selective Service Act.
>
> On November 8, 1948, I told Charles Ray Rickert of Ropp Hall, Bluffton, Ohio, "Stand by your principles, don't let them coerce you into registering." I made the above statement in the presence of Special Agent Tootell and a Deputy Sheriff of Allen County. At the time I made the above statement I knew Rickert was of draft age and that he had already refused to register for Selective Service on September 10, 1948.

---

[4] Petitioner did not sign this document because he did not like its "tone" and wanted "to think it over" (R. 129). He did not, however, deny that he made the statements.

> Following the passage of the Selective Service Act of 1948 I signed an open letter entitled, "A Call to American Christians of Draft Age" published by the Peacemakers of 2013 Fifth Ave., New York 35, N. Y. This open letter advocates refusal to register for the draft.[5]

Petitioner testified that as a Quaker he conscientiously feels that "wars are wrong, and that especially are wars wrong in our age, and really a form of race suicide" (R. 122); that a draft law is an immoral law that people such as he have an obligation to break (R. 133); that he expressed his feelings in this respect in an article he had written and in speeches he had made (R. 122); that he had made it a point to become acquainted with all non-registrants who are conscientiously opposed to conscription, and to support and identify himself with each such person, if he felt that such person was "inwardly prepared" to assume the responsibilities of his cause (R. 137); and that he supported Rickert and would do "any moral thing to encourage him" in his determination to oppose the draft law because he felt that Rickert was "inwardly prepared" (R. 138-145). He also testified that he had identified himself with the Peacemakers, an informal movement among many people, notably Christian ministers, who were opposed to

[5] The first, second, and fourth paragraphs quoted above were admitted only as bearing on petitioner's intent (R. 44-46, 166-167).

war and that he had signed the following pledge (Gov. Ex. 3, R. 192; R. 63-65, 122):

> PEACEMAKERS, Mt. Morris House
> 2013 Fifth Ave., New York 35, N. Y.
>
> I am in agreement with the Open Letter. I shall do what I can to spread its message. If a youth of draft age, I plan not to register or serve under the Draft; if not, I shall in every way possible assist and support Non-registrants.

The trial court instructed the jury in part as follows:

> * * * The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they would have a tendency to cause a refusal of duty as required by the Act. * * * [R. 167; see also R. 169.]
>
> * * * * *
>
> You are instructed that words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.
>
> * * * * *
>
> * * * In its wisdom Congress has provided what is known as the Selective Service

Act of 1948, and in that Act it has specifically said that any person who knowingly counsels, aids or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title or of said rules, regulations or directions shall, upon conviction, be punished as thereinafter provided. This was and is a prerogative of the Congress, and the right of free speech does not extend to such a point as to permit an individual to knowingly violate the law and then excuse the violation by alleging a reliance upon the First Amendment to the Constitution which grants him the right of free speech. [R. 168.]

* * * * *

You are instructed that it is the law that although one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection * * * [R. 169].

* * * * *

The defendant has testified that he was a member of a Society of Friends or Quakers, a religious sect, one of whose tenets is opposition to war and refusal to bear arms; and that he, because of his religious convictions conscientiously believed the Selective Service Law is immoral, unfair and unjust; and his counsel

has argued to you that the conduct of the defendant with which he is charged in this case was the result of his conscientious religious convictions, and for that reason he should not be found guilty as charged. You are instructed that such a belief, no matter how earnestly or conscientiously entertained, is not of itself a valid defense, excuse or justification for the violation of the law, if you find that the defendant did violate it, and that it should not be considered by you on the question of his guilt or innocence of the offense charged in the indictment. [R. 170-171.]

* * * * *

You are instructed that, under that Act and the Regulations which the President of the United States promulgated by Executive Order pursuant to the authority conferred upon him by law, it is the law that Rickert, having refused to register on September 10, 1948, which was the day prescribed for men of his age, had the continuing duty to register after that date and on November 8, 1948; and if you find under these instructions that the defendant on November 8, 1948, counseled, aided or abetted Rickert to evade or refuse registration or in continuing his refusal to register, and that the defendant did so knowingly, as charged in the indictment and proved to your satisfaction by the evidence in this case beyond a reasonable doubt, or if the natural and probable effect of what the defendant said to Rickert on November 8, 1948, under the circumstances there and then present, was of such a nature that it had

> a tendency to cause Rickert to continue his refusal to register under the Selective Service Act of 1948, whether or not it actually had that effect, you will find the defendant guilty as charged in the second count of the indictment. [R. 172.]

The jury found petitioner guilty (R. 180) and he was sentenced to eighteen months' imprisonment (R. 185). On appeal, the Court of Appeals affirmed the conviction (R. 207).

ARGUMENT

Petitioner does not challenge the sufficiency of the evidence to support his conviction under the trial court's instructions. His contentions are addressed principally to the constitutionality of the prohibition against counseling refusal or evasion of registration or service, on its face and as interpreted in the instructions, and to the validity of the regulation imposing a continuing duty to register.

1. Petitioner asserts that his counsel to Rickert on November 8, 1948, not to let himself be coerced into registering, did not constitute a violation of Section 12(a) of the Act on the dual grounds that Rickert's refusal to register, if any, occurred on September 10, approximately four weeks prior to the date of the counsel, and that Rickert had in fact complied with the requirements of the regulation (Pet. 5, 9-11, 17). In respect of the first ground, petitioner attempts to avoid the provision

of Section 611.6(d) of the Regulations that the duty to register "shall continue at all times" (*supra*, p. 3) by asserting that it is invalid because it "fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to" the "fundamental law that only Congress can create a crime and fix its punishment" (Pet. 11). Petitioner is clearly wrong. Section 3 of the Act imposes the duty: "* * * it shall be the duty of every male [person subject to its terms] * * * to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder." The regulation is a reasonable implementation of the duty so prescribed; it simply requires that a person who "for any reason" is not registered on a date fixed for his registration shall be under a continuing duty to register. The validity of an almost identical regulation under the 1940 act seems never to have been questioned. See *Fogel* v. *United States*, 162 F. 2d 54, 55 (C.A. 5), certiorari denied, 332 U. S. 791, where a conviction for failure to register was upheld against a claim that prosecution was barred by the statute of limitation solely on the basis that the offense was a continuing one. Neither does the regulation prescribe the penalty for the offense of refusing to register. Section 12(a) of the Act defines the

offenses and fixes the penalties. Although refusal to register is a continuing offense by virtue of the continuing duty imposed by the regulation, such refusal, contrary to petitioner's assertion, constitutes but one offense and not separate offenses each day the refusal continues. Accordingly, on November 8, 1948, Rickert was under a continuing duty to register. Petitioner's conduct in counseling Rickert to persist in his refusal was squarely within the prohibition of Section 12(a).

In support of his contention that Rickert had complied with the registration requirements of the regulations, petitioner relies on the recent decision of the Court of Appeals for the Second Circuit in *United States* v. *Norton*, decided January 19, 1950 (Pet. 9-10, 17). Petitioner has grossly misinterpreted that decision. The basis for the reversal of Norton's conviction was that there was no evidence that he refused to comply with the minimum requirements of the regulations, i.e., to appear before the board and to give it the information necessary to register him. Here, there is no lack of evidence, as there was in the *Norton* case, that Rickert refused to give the draft board the information it needed to register him. This contention, moreover, ignores the fact that subsequent to the date of petitioner's offense, Rickert was convicted on his plea of guilty of refusing to register (see p. 6, *supra*).

2. Petitioner's various arguments against the constitutionality of Section 12(a) as written and as applied here as an unwarranted abridgment of the rights of freedom of speech and religion present no new or novel questions. Substantially the same arguments were advanced in the Court of Appeals and, with greater elucidation than here, in the petition for a writ of certiorari in *Warren* v. *United States*, 177 F. 2d 596 (C.A. 10), certiorari denied, 338 U. S. 947, which involved a conviction of a conscientious objector to war for counseling his stepson not to register. The Court is respectfully referred to our brief in opposition in that case for our replies to these contentions.

Petitioner's complaint that the district court misapplied the "clear and present danger" test, even if otherwise meritorious (but see R. 205-206) would not be open to him here. For after the charge of which he now complains, petitioner's counsel made no such point as is now made, saying only (R. 175): "The court in a number of parts of its charge has referred to clear and present danger. We except to that because in this case there is no evidence of clear and present danger."

The only other contention here which was not presented in the *Warren* case is that the words of Section 12(a)—"counsels, aids, or abets another to refuse or evade registration"—do not satisfy the requirement of definiteness in a criminal statute. But the prohibition of the statute applies only to one who "knowingly"—i.e., intentionally and con-

sciously—counsels another to refuse to register, and there was ample evidence to show that petitioner knew he was violating the Act. Cf. *Screws* v. *United States,* 325 U. S. 91, 103-104. We think it is clear that this provision of Section 12(a), in terms which have a well understood meaning in the criminal law and are found in many statutes, does provide a reasonably definite and ascertainable standard of guilt.

CONCLUSION

The decision of the court below is correct, and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 878333 382

Office - Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 19

LARRY GARA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF PETITIONER.

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IN THE

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No. 19.

LARRY GARA,
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BRIEF OF PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals for the Sixth Circuit is printed on pp. 201 to 207 of the Transcript of Record and is reported at 178 Fed. 2d 38.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 28, 1949 (Tr. 201). A

Petition for Rehearing was filed on December 19, 1949 (Tr. 208-216) which Petition was denied on January 16, 1950 (Tr. 216).

A Petition for Writ of Certiorari was filed on February 15, 1950 and the same was granted on April 3, 1950. By order of this court the case was transferred to the Summary Docket (Tr. 216).

STATEMENT OF THE CASE.

On September 10, 1948, the date set for his registration, Charles Ray Rickert, a Divinity student at Bluffton College, appeared before his Draft Board and gave the Clerk his name, address and year of his birth. He refused to give further information or to sign his draft card because, as he stated, such affirmative acts would be contrary to his religious belief. Rickert also stated, orally and in writing, that his decision to contribute nothing affirmative to his registration was irrevocable (Tr. 21, 23, 24, 97 and 98).

Ten days later, or about the 20th of September, Rickert first met Petitioner Gara, the Dean of Men, at his College (Tr. 100, 101). From that date on and up to November 8, 1948, when Rickert was arrested, various conversations were held between the two. They discussed conscientious objections to war; the Christian duty of religious practices, and "the need of being inwardly prepared" to take the consequences of one's action. Gara, having learned that Rickert was inwardly prepared, approved the latter's act of following the dictates of his conscience (Tr. 114, 125, 138 and 142). On November 8, 1948, *i. e.*, the date of Rickert's arrest, Gara told him "Stand by your convictions. Don't let them coerce you into registering," or "Don't let them coerce you into going against your conscience," or some words to the same effect (Tr. 29, 70, 71 and 127).

Petitioner Gara was indicted and the indictment filed before the District Court of the Northern District of Ohio charged that: "On or about the 8th day of November, 1948 at Bluffton, in the Northern District of Ohio, Western

Division, Larry Gara knowingly counselled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the *Selective Service Act* of 1948" (Tr. 2).

Among the instructions of the Trial Court given to the jury were that:

> "In further analyzing the Count of the Indictment, you will note that it provides that Larry Gara knowingly counselled, aided and abetted. To counsel means to advise, to give advice to, to offer an opinion worthy or expedient to be followed. The words 'aiding' and 'abetting' are not synonymous. To abet is to encourage, counsel, incite or instigate the commission of a crime. To aid is to support" (Tr. 168).

The Trial Court also instructed the jury that:

> "It is the apparent contention of the defendant that he did not counsel, aid or abet Rickert in his refusal to register on September 10, 1948, but merely that he supported him in his attitude after he, Rickert, had decided in his own mind not to register because of his religious beliefs or the dictates of his own conscience. You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948 under the circumstances then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the *Selective Service Act* of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the Second Count of the Indictment" (Tr. 169).

(The Second Count of the Indictment was the only one on which Petitioner was tried since Count One of the Indictment was voluntarily dismissed by the government prior to the trial (Tr. 3).)

SPECIFICATION OF ASSIGNED ERRORS.

Petitioner intends to urge all the points which were first raised by him in the Trial Court and subsequently in the Court of Appeals for the Sixth Circuit. These points are:

1. The *Selective Service Act* of 1948 and Section 12(A) thereof are unconstitutional because:

   (a) As the same were construed by the Trial Court and by the Court of Appeals, petitioner was deprived of his freedom of speech and the free exercise of religion both guaranteed by the First Amendment of the Constitution.

   (b) The First Amendment of the Constitution was wholly disregarded on the basis of the theory of "Clear and Present Danger."

   (c) The Act is too indefinite and vague in its terms. It was not strictly construed in favor of the petitioner as required by the law.

   (d) The Trial Court instructed the jury to convict, using the "tendency to encourage" test. Such test was held by this court to be inconsistent with the Constitution.

2. Petitioner's conviction deprives him of the due process of law in violation of Amendments V, VI and VIII of the Constitution in that:

   (a) He was found guilty of counselling, aiding and abetting refusal to register when the non-registrant's refusal occurred before the alleged counselling, aiding or abetting was even physically possible.

   (b) Petitioner was convicted of counselling, aiding, or abetting refusal to register while in fact the non-registrant complied with whatever the law required him to do: namely, to "present himself for and submit to registration."

3. The holding of the Trial Court and of the Court of Appeals that the regulations under the Act provide for a "continuing duty" of the registrant to present himself for and submit to registration is contrary to the provisions of the *Selective Service Act* of 1948. The ruling of the Courts below thus attempted to create a new crime for every moment of the non-registration. Such holding is invalid.

ARGUMENT

I.

(a) The Selective Service Act of 1948 and Section 12(A) Thereof Are Unconstitutional Because as the Same Were Construed by the Trial Court and the Court of Appeals, Petitioner Was Deprived of His Freedom of Speech and Free Exercise of Religion, Both Guaranteed by the First Amendment of the Constitution.

The *Selective Service Act* of 1948 and the part thereof under which petitioner stands convicted reads: "Any person who knowingly counsels, aids or abets another to refuse or evade registration • • • " shall be punished as provided by the Act. The Act of 1948 in effect amended the Act of 1940 in that the later law made counselling, aiding or abetting "refusal to register" a crime, but previously only counselling, aiding or abetting evasion was so made criminal. In fact, under the prior Act, this court held in *Keegan v. United States,* 325 U. S. 478 that counselling "refusal" was not a criminal act. In view of the changed wording of the 1948 statute, this is a case of first impression which requires this court's careful consideration.

In advising and instructing the jury, **the Trial Court in effect held that the petitioner could and must be convicted for telling one of his students to follow his conscience.** That this was the instruction is evident when we recall that the evidence showed and the admission of petitioner demonstrated that on November 8, 1948, he told his student Rickert "Stand by your convictions; don't let them coerce you into going against your conscience;" (Tr. 29, 70-71 and 127). On the basis of such admission and evidence the Trial Court instructed the jury;

" • • • that if what the defendant knowingly said to

> Rickert on the 8th day of November 1948 under the circumstances then and there present was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register * * * whether or not it actually had that effect, it would constitute an offense within the meaning of this act * * * " (Tr. 169).

The above is a dangerous instruction and if it is permitted to stand, it will become a dangerous law, wholly negating the First Amendment of the Constitution which up to the time of the trial court's instruction to the jury in Toledo, Ohio protected freedom of speech. It is a dangerous instruction and if it is permitted to stand, becomes a dangerous law because in effect it will take away the Constitutional protection of free exercise of religion. It is dangerous because the record is clear that the student Rickert refused,—due to his deep-seated religious conviction and carrying on in accordance with such a conviction—to register for the draft. Petitioner's statement, following Rickert's refusal by two months, could at worst be interpreted as an advice against abandoning one's religious freedom while confronted by the coercion of imprisonment.

Section 12(A) of the Act, interpreted by the Trial Court, makes everyone a candidate for prison who believes and expresses a belief in following one's conscience—particularly when that conscience dictates certain conduct in exercising one's religious belief. The instruction complained of attempts to take away the Constitutional protection both from Freedom of Speech and Free Exercise of Religion.

The justification to uphold the trial court's instruction is expressed by the Court of Appeals in a sentence which we are forced to admit we are unable to understand. The Appellate Court stated in the concluding paragraph of its opinion that Petitioner:

> "* * * may attack the Selective Service Act of 1948

> from every platform in America with impunity, but he cannot under the guise of free speech nullify it by disobedience to its express provisions."

We are at a loss to understand what the Court meant by the term "the guise of free speech". Is it meant that speech remains free in this country only as long as it is ineffective, but as soon as it threatens to present such weighty argument that it may overcome a preconceived idea,—be it a law or an opinion,—then it is taken out from under the protection of the First Amendment of the Constitution? It is a strange and dangerous idea—one which we hope cannot stand in this country.

The Court of Appeals in upholding the conviction of Petitioner, takes the position that the understanding of the members of Congress as to the needs of National Defense, from time to time is a paramount and exclusive determinant to which all others, including the prohibition contained in the First Amendment, must yield. The opinion herein appealed from says Congress:

> "• • • has the obligation, under the Federal Constitution, of providing for the common defense. In the Preamble to the Selective Service Act of 1948 under the Congressional declaration of policy, it is stated 'the Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this nation'. We take judicial notice of the existence of the so-called 'cold war' which in the view of Congress necessitated this peacetime draft."

As we read the opinion of the Court of Appeals, it is apparent therefrom that that court held that as against the wisdom of the members of Congress, the provision against restriction on religious freedom and freedom of speech contained in the First Amendment, must take second place. We believe that this is an error so fundamental that it threatens to negate the whole of the Constitutional basis

of this country's government. It is an error because it is an anomoly to believe that the rights originally belonging to the sovereign—that is the people—which were by positive words retained by the people; the restrictions which were positively placed upon Congress, may be destroyed and the powers may be taken and returned to the sovereign at the pleasure of Congress. Such was not contemplated by those who wrote the Constitution and particularly when they framed the First Amendment which says without any equivocation, that **Congress shall make no laws** * * * *restrictive of the free exercise of religion or interfering with freedom of speech.* The record in this case clearly discloses that both Rickert who refused to register and petitioner who thought (and expressed the thought) that Rickert ought not to permit anyone to coerce him against his conscience, were acting because of deep and confirmed moral and religious beliefs. Such an act was more than once considered by this court as being protected by the First Amendment.

In the case of *West Virginia State Board* v. *Barnette*, 319 U. S. 624, the protection of the First Amendment is extended to the right of the citizen to refuse to salute the American Flag, if such refusal is because of his religious practice. Because the phrase "civil disobedience" is apparently in the mind of some as an act not to be contemplated under any circumstances, it is proper to point out that the *Barnette* case refers approvingly to the action of the early Quakers, who refused to doff their hats to civil authority—a refusal which in those days and under the circumstances was considered an act of civil disobedience.

In the case of *Murdock* v. *Pennsylvania*, 319 U. S. 105, the Supreme Court upheld the right of individuals to distribute religious pamphlets even though such distribution was charged against them as creating disturbance.

In the case of *Kovacs* v. *Cooper*, 336 U. S. 77, the Su-

preme Court gave an answer to those who wrongly claim that the First Amendment protects religious beliefs as long as those beliefs are not carried into practice, contrary to ordinances, statutes or regulations. In that case, the Supreme Court said of an ordinance which attempts "censorship of speech or religious practices before permitting their exercise the Constitution forbids their enforcement." In this case, the practice and not just the belief was put under the protection of the First Amendment. It was said in the *Kovacs* case the Constitution forbids the enforcement of a law which attempts to interfere with or censor a religious practice.

In the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, the Supreme Court upheld the right of members of Jehovah's Witnesses to play a victrola record which attacked Catholicism, even in streets where the majority of the people were Catholics, in which case the lower court felt that such an act of the Jehovah's Witnesses was a provocation.

In the case of *Taylor* v. *Mississippi*, 319 U. S. 583, the right to distribute literature by pacifists directed against the draft law and against wars, was upheld.

The minority decision in the case of *Schwimmer* v. *United States*, 279 U. S. 644, is today the decision of the majority. Therefore, the minority opinion of Justice Holmes is pertinent. He said:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate * * * the Quakers have done their share to make the country what it is."

In the case of *MacIntosh* v. *United States*, 283 U. S. 605, the minority opinion was later adopted by the majority.

(See *Girourard* case, below.) There Chief Justice Hughes said:

> "• • • the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be allegiance to the will of God. • • •"

and further:

> "One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God • • • and • • • freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field."

The minority opinion in the case of *In Re Summers*, 325 U. S. 561, may be also cited, since we submit that the minority opinion of the four justices therein is now supported by the majority in the case of *Girourard* v. *United States*, 328 U. S. 61. In this latter case the court said:

> "• • • The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States* v. *Ballard*, 322 U. S. 78, 86, 'Freedom of

thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U. S. 624.' "

Petitioner's position is clearly covered by the dissenting opinion of Chief Justice Stone in the *Minersville School District* v. *Gobitis* case, 310 U. S. 586, where it was said:

> "I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties. * * * The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit. * * * They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression. * * * The very essence of the liberty which they guaranty is the freedom of the individual from the compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion. This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."

The above opinion of the minority, became that of the majority Court in the case of *Board of Education* v. *Barnette* (*supra*).

It is hard, if not impossible to believe that in face of the decisions hereinabove cited, this court would agree with the Court of Appeals that the instruction of the Trial Judge, which in effect directed the petitioner's conviction, may stand.

(b) The Selective Service Act of 1948 and Section 12(A) Thereof, Are Unconstitutional Because Both the Trial Court and the Court of Appeals Wholly Disregarded the First Amendment of the Constitution on the Theory of "Clear and Present Danger."

The opinion of the Court of Appeals in pointing out that Congress had the right and the duty to make the *Selective Service Act* of 1948, concluded that the Trial Court was justified in giving his instructions as he did on the ground that "we take judicial notice of the existence of the so-called 'cold war' which in the view of the Congress necessitated this peacetime draft." We are not here to argue whether or not Congress had the right to put the Act here involved on the books, but we argue that neither cold war nor hot war nor any war, justifies the elimination of the Constitutional protection heretofore extended to freedom of speech and freedom of religion. In the opinion of the Court of Appeals, there is an APPARENT justification for upholding the Trial Court and that apparent justification is derived from the precept of "clear and present danger." We do not believe that the precept ought to apply as a whole and we further believe that if it is applied, it cannot apply to restrict religious freedom. So it was proven by the clear exposé of Professor Alexander Meiklejohn in his book *Free Speech* (Harper & Brothers, Publishers, 1948).*

Professor Meiklejohn, in analyzing and comparing the First and Fifth Amendments to the Constitution concludes that the intent was that the First Amendment provide an *unlimited guarantee of freedom* of speech and obviously of the free exercise of religion. He says that the First Amendment:

"* * * correlating the freedom of speech in which

* Taken from the above book with the kind permission of the author.

it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation—beyond even the due process of law. With regard to them, Congress has no negative powers whatever."

Professor Meiklejohn, discussing the basis of the Constitution: namely, the compact between the people and the government,—concludes that **the freedoms guaranteed by the First Amendment and the injunctions directed to Congress, are "The basic postulates of a society which is governed by the votes of its citizens."**

It appears that we are almost ready to accept that the First Amendment does not mean what it says, and we are almost grateful that there is a certain limitation set on the power of Congress as to the extent that our basic freedoms may be restricted. We are almost ready to assume that Justice Holmes' winged phrase of "clear and present danger" is something generally accepted, when in fact Justice Holmes, its author himself, supported by Justice Brandeis, was clearly aware that putting a restriction on this restriction is not only needed but is required. While in the first instance the rule of "clear and present danger" was presented without any qualification, subsequent decisions added qualifying phrases agreeing that dangers in themselves do not justify the suppression of basic rights guaranteed by the First Amendment. The first judicial interpretation was that an emergency will justify the application of the "clear and present danger" rule. Subsequent qualifications went farther and stated that it may be applied only when the evil to be suppressed is grave, etc. See Oliver Wendell Holmes, *Collected Legal Papers* (Harcourt, Brace and Howe, New York, 1920). Also see Zechariah Chaffee, Jr., *Free Speech in the United States* (Harvard University Press, 1942) and see Myer

Cohen, *Selected Supreme Court Decisions* (Harper & Bros., 1937).

It is hard if not impossible to disagree with Professor Meiklejohn that **accepting the "clear and present danger" theory means in effect that "The compact of self-government has been ignored or repudiated."** (Opus cited, p. 89.) It is hard if not impossible to disagree with him that **the unabridged freedom guaranteed by the Constitutional Amendments, "is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any 'clear and present'—or even terrific danger."** (Opus cited, p. 91.)

We do—as did Justices Holmes and Brandeis—disagree with the "clear and present danger" theory. Nevertheless we may assume—without admitting it—that such theory is constitutionally proper and justified. However, even with such assumption, it is clear that the defendant's right to free exercise of his religion, cannot be restricted in the instant case.

The rule of "clear and present danger" cannot in the case of petitioner deprive him of the protection of the First Amendment. It would be hard, if not impossible, to argue that his statement to Rickert is to be an exception to the First Amendment because it represents a clear and present and grave danger to the state security. The rule is laid down by the Supreme Court of the United States in *Bridges* v. *California*, 314 U. S. 252, as follows:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally.

> It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

It seems to us that it is hard if not impossible to argue that petitioner's statement—made on November 8 to one who on September 10 refused to register—to the effect that he ought not be coerced to violate his conscience is a substantive evil. Nor can it be said that it is extremely serious nor do we believe that the degree of the imminence of the danger to the state is extremely high. We further submit that the statement of petitioner so made on November 8 is clearly within the protection of the First Amendment, and, therefore, it was erroneous to find him guilty and it was further an error on the part of the Court of Appeals to affirm the conviction.

(c) The Selective Service Act of 1948 and Section 12(A) Thereof Are Unconstitutional Because the Terms Thereof Are Indefinite and Vague and, as Construed, Were Applied Against the Petitioner Contrary to the Requirements of the Law.

The law is elementary and the cases are legion holding that criminal statutes, such as the one here involved, that do not furnish guideposts as to what is prohibited conduct, are void for vagueness. See *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507; *Herndon* v. *Lowry*, 301 U. S. 242; *De Jonge* v. *Oregon*, 299 U. S. 353; *U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Connolly* v. *General Construction Co.*, 269 U. S. 385 and other cases cited therein.

Petitioner complains that the statute being a criminal one, was not strictly construed in his favor, as required by the elementary law. This rule of law was not followed

by the Trial Court nor was it considered by the Court of Appeals, even though the record clearly discloses that the statute was interpreted during the trial in such a manner that it became a "catch all." The statute as we understand it was intended as a draft act and was not intended, as the Trial Court did, to police petitioner's speech. The Trial Court's instructions to the jury, which in effect made it a crime to give (as petitioner did) moral comfort to one who has already irrevocably decided his course of conduct, shows with striking clarity that the statute was construed so broadly that it goes beyond all previously accepted yardsticks. This Court in *Hartzel* v. *U. S.*, 322 U. S. 680; 64 S. Ct. 1223, went on record against permitting the interpretation of a statute so broadly that it may become a "catch all." This Court is well familiar both with the evidence and with the opinion written by the late Justice Murphy. Nevertheless, it may be proper to recall a short paragraph from that case. This Court was

> "* * * not unmindful of the fact that the United States is now engaged in a total war for National Defense, and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable factor is disloyal. For that reason, our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty. Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's pamphlets * * *. But the mere fact that such ideas are enunciated by the citizen is not enough by itself to warrant a finding of a criminal intent to violate Section 3 of the *Espionage Act* * * *. An American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917."

The decision of this court and its disapproval of the government's argument in the case of *Viereck* v. *U. S.*,

318 U. S. 236; 63 Supreme Court 561, is quite apropos here where the government argued to the jury and to the Trial Court that unless petitioner is restricted in his freedom of speech, the *Selective Service Act* becomes a "half-way measure." This court on that score had the following to say in the *Viereck* case:

> "The Government argues that the statute would have been a 'half-way measure' had it not required, or at least authorized the Secretary to require the registrant to reveal the propaganda which he put out other than on behalf of his foreign principal * * *."

And it further said:

> "Even though the specific restriction of Section 3 (c) were due to defective draftsmanship or to inadvertence, which hardly seems to be the case, men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law."

It is apparent that if Congress intended by the *Selective Service Act* of 1948 to police freedom of speech it should have so stated. Congress has not done so and, therefore, the Trial Court was in error when he instructed the jury to convict petitioner because he admittedly, two months after Rickert refused to register, encouraged him in the hard days to come by standing by with his sympathy and in Christian brotherhood. Such an overt act on the part of petitioner is not forbidden by the statute because one cannot substitute one act not forbidden for one that is forbidden. So it was said by this court in the *Viereck* case:

"We cannot read that phrase as though it had been

written 'while an agent' or 'who is an agent'. The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

In the face of the ruling of this court in the *Viereck* and in the *Hartzel* cases, the conviction of petitioner cannot stand.

(d) The Selective Service Act of 1948 and Section 12(A) Thereof Are Unconstitutional if the Trial Court's Instruction as to Petitioner's Words "Having a Tendency to Encourage," Is Upheld as Sufficient for Conviction.

Petitioner complained in the Trial Court and again before the Court of Appeals against the instructions which made the "tendency" of petitioner's statement a justification for conviction. The Trial Court said to the jury that:

> "You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November 1948 under the circumstances, then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the *Selective Service Act* of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the Second Count of the Indictment" (Tr. 173).

In the case of *Terminiello* v. *Chicago*, 69 S. Ct. 894, this Court, we believe, clearly rejected the "tendency" test. In that case the instructions of Judge McCormick of the Municipal Court of Chicago pertaining to the interpretation of the words "breach of peace" as used in the Chicago ordinance stated:

> "Misbehavior may constitute a breach of peace if it

> stirs the public to anger, incites dispute, brings about a condition of unrest or creates a disturbance or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."

This Court, analyzing the instruction, found that the ordinance, as construed by the Trial Court's instruction, invaded the province of supposition in that, "it permitted conviction of petitioner if his speech stirred people to anger, incited public dispute or brought about a condition of unrest," and disagreeing with such interpretation, held that, "A conviction resting on any of those grounds may not stand."

The Court of Appeals before which we argued the *Terminiello* case (*supra*) concluded that the same has no application to the "tendency" test in the case as bar. That court said:

> "The cited case involved an ordinance which as construed by the Trial Court directly invaded freedom of speech. The *Selective Service Act* does not even purport to enter the field of restriction of speech or of publication."

We agree, as we said before, with the second part of this statement: namely, that the Act under which petitioner was convicted, "does not even purport to enter the field of restriction of speech * * *." However, we disagree with the Court of Appeals when it finds that while the *Terminiello* case did, the present one does not invade freedom of speech.

One wonders whether or not the conviction of petitioner can stand when the jury was instructed, if not commanded, to convict him because he had said something which, "Had a tendency to encourage or cause Rickert to continue his refusal to register * * *." We wonder whether or not the Trial Court intended, by his charge to the jury and the Court of Appeals by its opinion upholding the Trial Court,

to challenge the Freedom of Speech provision of the Constitution when it was added to the instruction that it is not even necessary that petitioner's speech has the effect "to encourage", but he may be convicted if it had no such effect. The conviction is just about mandatory under the instructions if petitioner's speech had, "THE EFFECT OF HAVING A TENDENCY TO ENCOURAGE." If such is the rule of the law, then we are indeed treading perilously close to the total elimination of Freedom of Speech.

As we read this Court's decision in the *Terminiello* case, the Court of Appeals was duty-bound to reverse petitioner's conviction, if on no other than the ground of the above instruction. This Court said:

> "The vitality of civil and political institutions in our society depends on free discussion, as Chief Justice Hughes wrote in *De Jonge* v. *Oregon*, 299 U. S. 353, 365, 57 S. Ct. 255, 260, 81 L. Ed. 278, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."
>
> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* 315 U. S. at pages 571-572, 62 S. Ct. at page 769, 86 L. Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or

unrest. (See *Bridges* v. *California*, 314 U. S. 252, 262, 62 S. Ct. 190, 193, 86 L. Ed. 192, 159 A. L. R. 1346; *Craig* v. *Harney*, 331 U. S. 367, 373, 67 S. Ct. 1249, 1253, 91 L. Ed. 1546.) There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

The instruction complained of permits—nay it directs—conviction if a speech has a "tendency to encourage" someone to do certain things. Such an instruction strikes deeply into the heart of the Constitutionally protected acts of the sovereign,—of the people. As a matter of fact, the Trial Court's instruction is contrary to the whole line of decisions pertaining to freedom of speech as cited in *Thornhill* v. *Alabama*, 310 U. S. 88; 60 S. Ct. 736, and other cases. While the Supreme Court in the *Terminiello* case expressed the opinion that free speech may best serve its high purpose "when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger", petitioner's speech to Rickert did not even do as much. He created no unrest, but rather gave Rickert peace of mind when he learned that others agree with his Christian attitude of following the dictate of conscience. It is very unlikely that petitioner created dissatisfaction in the mind of Rickert but rather his sympathy made him willing to accept and thus become satisfied with the prospect of imprisonment meted out to him because he stood by his religious practice. Under no circumstances can it be said that petitioner either intended or did cause Rickert to be stirred to anger. Therefore, we say that there will be small vestige left of our freedom of speech if a man, as petitioner, can be convicted for stating anything which in the mind of the jury will appear as having "a tendency to encourage" someone else "to continue his refusal to register."

II.

(a) Petitioner's Conviction Deprives Him of Due Process of Law in Violation of the Amendments V, VI and VIII of the Constitution in That He Was Found Guilty of Counselling, Aiding or Abetting Refusal to Register Even Though the Nonregistrant's Refusal Occurred Before Such Alleged Counselling, Aiding or Abetting.

The record is clear that while Rickert finally and irrevocably refused to register on September 10, 1948, he did not even meet petitioner before the 20th of September of that year. It is obvious from the facts that to convict petitioner, it was necessary to give a retroactive effect of his words so that if he did counsel Rickert during their first meetings on the 20th, that that effectively aided, and abetted Rickert to make up his mind ten days earlier. The Trial Court did not feel that such a retroactive effect could be assigned to petitioner's words. Therefore, he departed from the Indictment and substituted a new offense. The Indictment on which petitioner was tried and convicted says that he, on the 8th of November 1948, "knowingly counselled, aided and abetted one Charles Ray Rickert to refuse or evade registration. * * *" The Indictment does not charge that petitioner counselled Rickert TO CONTINUE to refuse to register. Yet, this is what he was convicted of. He could not possibly be convicted of counselling Rickert to refuse registration because petitioner did not even know Rickert at the time when the refusal to register occurred on the 10th of September. Here petitioner was charged with one crime (if his act be a crime) and convicted of another. This is not permissible as this Court said in *Fogel* v. *U. S.*, 335 U. S. 865; 69 S. Ct. 136.

In that case, Fogel was indicted and convicted for

failure to register for the Selective Service and his Motion for a New Trial on the ground of newly discovered evidence, was denied. On appeal, the Court of Appeals affirmed and Fogel's first Petition for a Writ of Certiorari was denied. Subsequently, however, this court reversed referring to the record, 167 Fed. 2d 763, that being the opinion of the Court of Appeals where two of the judges affirmed the District Court's denial of a new trial. It appears to us that this Court's reversal and the granting of the Motion for a New Trial is bottomed on the dissenting opinion of the sole judge—Justice Sibley—which opinion is pertinent here. The District Court in denying the Motion for a New Trial agreed with the Government's Attorney, that even though Fogel was born in 1894 instead of as alleged in 1898, nevertheless, because of the subsequent duty to register for the older age limit he "could be put on trial again, if we granted a new trial, under the Indictment as it now exists," Justice Sibley stated:

> "Fogel was not indicted nor tried for failing to register on that date or on that basis and on review by the District Judge, and in this Court the charge cannot be thus shifted to sustain the conviction."

This Court agreed with Justice Sibley in disapproving the shifting of the charges in *Cole* v. *State of Arkansas*, 68 S. Ct. 514; 167 Fed. 2d 763. As our record discloses Rickert, was not indicted nor was he tried nor was he convicted for his failure to register on November 8, 1948. He was not indicted for his failure to change his mind on November 8, but was indicted, tried and convicted for his refusal to register on September 10. It is by means of a shifting of the grounds of the indictment that petitioner could be indicted, tried and convicted on the ground that his words spoken on November 8 had the tendency to encourage Rickert to *continue his refusal to register.*

In a criminal case it needs but little argument that due process of law requires that a man cannot be convicted of a crime with which he was not charged at the outset. To permit such a practice catches the defendant by surprise and puts him in a position to have to defend himself against the charge previously unknown to him. Here the shifted charge was not known to petitioner until the instructions of the Trial Court were given and, in consequense, he had not even the opportunity to attempt to bring in evidence against the accusation leveled against him the first time in the instructions. We submit that petitioner's conviction under the facts and the law cannot be upheld.

(b) Petitioner Is Deprived of Due Process of Law Since He was Convicted of Counselling Refusal to Register While in Fact the Nonregistrant Complied With Whatever the Law Required Him To Do.

There is a conflict between the decisions of the several Circuit Courts as to the requirement of a person who is subject to the Act. The law says that a person of a certain age group is to "present himself for and submit to registration." The record here discloses that Rickert—petitioner's counselee—went to his draft board, gave his name, but refused to do any positive act towards registration. Under those circumstances, the Court of Appeals for the Second Circuit (L. Hand, Swan and Clark C. J. S.) in *U. S.* v. *Norton*, 179 F. 2d 527, found that Norton, who did exactly what Rickert did in this case, had complied with the law. Neither the statute nor the regulations thereunder make it an offense to refuse to sign the registration card. Rule 642.31 expressly provides that if a registrant refuses to give information or refuses to sign his name, the Board shall get the information from other sources, shall sign his name in lieu of

him and thus shall complete the registration. The Court in the *Norton* case (*supra*) said:

> "The regulation having provided a substitute for registrant's signature, we believe that the substitution was meant to serve for all purposes including the condoning of the refusal * * * we conclude that the crime for which he was indicted was not proven."

Under the Norton decision, Rickert ought not have been found guilty of any crime and he may not have been, but for the fact that he pleaded guilty. Nevertheless, the petitioner has the right to ask the court for its determination whether or not he can be found guilty of counselling, aiding and abetting Rickert to commit a crime which, in fact, was not committed by Rickert.

In the case of *Taylor* v. *Mississippi*, 319 U. S. 583, it was held by this court that since refusal to salute the flag was not a crime (following *West Virginia* v. *Barnette*, 319 U. S. 624) in consequence, counselling refusal to salute cannot be held a crime either.

III.

The Holding of the Trial Court and the Court of Appeals That the Regulations Under the Act Provide for a "Continuing Duty" by the Registrant to Present Himself and Submit to Registration, Attempts to Create a New Crime for Every Moment of the Nonregistration Period.

Section 3 of the Act states that men shall present themselves "at such time or times and place or places, and in such manner as shall be determined by proclamation of the President and rules and regulations prescribed hereunder." (U. S. C. 50, App., sec. 452.) By proclamation of the President of June 20, 1948, dates were set from August 30th to September 20th, 1948, for registration of separate age groups. On the date fixed for his age group

Rickert presented himself to his local board, and it was then that whatever refusal he offered was completed. Regulations were also promulgated under the Act, Reg. 611.6 (d) which provides:

> "The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be."

This regulation is the key to the conviction of petitioner. The lower court appears to hold that what might otherwise be sympathy with a person who had previously broken the law, becomes counselling further law violation because of the "continuing duty" to register. This means that the regulation has made each day of refusal of registration a separate crime. A person who refused for 30 days would be subject to imprisonment for 150 years and fine of $300,000, contrary to the obvious intendment of the statute.

It is fundamental law that only Congress can create a crime and fix its punishment. Congress may provide that violation of administrative rules is a crime; but the administrative agency may not create a crime nor add to the penalties fixed by Congress. Regulation 611.6 (d) fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to law:

Viereck v. *United States*, 318 U. S. 236 (1943).

United States v. *Grimaud*, 220 U. S. 506 (1911).

United States v. *Eaton*, 144 U. S. 677.

People v. *Grant*, 242 N. Y. App. Div. 310, 267 N. Y. 508 (1935).

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921).

Connolly v. *General Construction Co.*, 296 U. S. 385 (1926).

The English rule is to the same effect as pleaded by us:

> "The Act may confer the power of making regulations and go on to provide that a breach of regulations so made shall be a punishable offense; but no regulations could themselves create offenses or impose penalties." *M. L. Gwyer*, 5 J. of Pub. Ad. 404, 409.

Conclusion.

This Petitioner respectfully asks that the judgment of the United States Court of Appeals for the Sixth Circuit may be reversed by this court and that his conviction may be set aside as a deprivation of petitioner's Constitutional rights.

Respectfully submitted,

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Proclamation and Regulations:	
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Selective Service Regulations:	
Section 611.5 (d) (6 F. R. 6842)	22
Section 611.6 (d) (32 C. F. R. (1949 ed.) 1611.6 (d))	15, 20, 25, 26, 57
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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 19

LARRY GARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 201–207) is reported at 178 F. 2d 38.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1949 (R. 201), and a petition for rehearing (R. 208–215) was denied on January 16, 1950 (R. 216). The petition for a writ of certiorari was filed on February 15, 1950, and was granted on April 3, 1950 (R. 216). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the courts below correctly ruled that petitioner had "knowingly counseled, aided and abetted" another to refuse to register under the Selective Service Act of 1948, in violation of Section 12 (a) of that Act.

2. Whether the application here made of Section 12 (a) of the Selective Service Act is consistent with the First Amendment guaranty of freedom of speech and religion.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved are set forth in the Appendix, *infra,* pp. 53–59.

STATEMENT

Count 2 of a two-count indictment (R. 2) filed on January 4, 1949, in the District Court for the Northern District of Ohio, charged that petitioner, on or about November 8, 1948, knowingly counseled, aided, and abetted one Charles Ray Rickert to refuse to register under the Selective Service Act of 1948, in violation of Section 12 (a) thereof (Appendix, *infra,* pp. 56–57).[1] Fol-

[1] Count 1, charging that petitioner, between June 24, 1948, and November 8, 1948, knowingly counseled, aided, and abetted "other individuals, the names of whom are unknown to this grand jury" to refuse or evade registration or service under the Act and to refuse to comply with rules and regulations issued thereunder (R. 2), was dismissed prior to trial on the Government's motion (R. 3, 177).

lowing a trial by jury, he was found guilty (R. 180) and sentenced to 18 months' imprisonment (R. 185) . On appeal to the Court of Appeals for the Sixth Circuit, the judgment of conviction was affirmed (R. 201).

The evidence adduced at the trial may be summarized as follows:

1. On November 8, 1948, the date of the offense of which he was convicted, petitioner, then 26 years of age (R. 118, 190), was Dean of Men and a teacher at Bluffton College, Bluffton, Ohio, an institution supported by the Christian sect known as Mennonites (R. 118, 123, 141–142). He was and is a member of the Religious Society of Friends, also known as Quakers (R. 118). He had previously, in 1942, been convicted, on his plea of *nolo contendere,* of refusing to register under the Selective Training and Service Act of 1940, and had thereafter served a prison sentence for that offense (R. 150–152, 123, 124).

Charles Ray Rickert was a fourth-year, pre-divinity student at Bluffton College in the fall of 1948 and was in one of petitioner's classes (R. 97, 107, 141). He lived in a room in Ropp Hall, a dormitory on the campus in which petitioner's apartment was also located (R. 102, 118, 123, 126, 127). Having been born in 1927, Rickert was required, by the terms of the Presidential Proclamation fixing dates for registering under the Selective Service Act of 1948 according to age

groups,[2] to register on either September 10 or 11, 1948 (R. 97). On September 10, 1948, Rickert appeared before his local draft board and "informed [the members of the board] that [he] was not registering" (R. 97).[3] He advised them that the reason why he was refusing to register was that he was a conscientious objector to war and conscription, and he gave them a letter, written by himself, in which he stated his position (R. 23, 98). He gave the board his name, address, and the year of his birth, but refused to give any of the remainder of the information necessary to register him under the Act, such as his exact birth date, place of birth, occupation, marital status, etc. (R. 21; see Gov. Ex. 1, R. 189). The members of the board "talked to him and tried to get him to change his mind" (R. 23), and explained to him the penalties for refusal to register (R. 24), but he "still refused to register; his mind was made up to that" (R. 24).[4]

2. Rickert, who testified at petitioner's trial as a defense witness (R. 97), stated that he first met petitioner on September 8 or 9, 1948, in a

[2] Proclamation 2799 of July 20, 1948 (13 F. R. 4173).

[3] Rickert had previously, upon attaining the age of 18, registered under the Selective Training and Service Act of 1940, and had been granted a deferment on the basis of his status as a divinity student (R. 107).

[4] Rickert never thereafter returned to his local board's offices and so was never registered (R. 22, 24). He was subsequently indicted, convicted upon a plea of guilty, and sentenced to 18 months' imprisonment for his refusal to register (Def. Exs. D and E, R. 197–198; R. 106).

classroom at Bluffton College (R. 99). On or about September 20, 1948, he testified, petitioner summoned him to his (petitioner's) dormitory suite and (R. 101)—

> * * * introduced himself at that time: the first time we were actually formally introduced. I had spoken to him before but not introduced by our names. He informed me he knew of a case from Bluffton College Campus, in which a non-registrant was involved for Selective Service. That was the first time he had mentioned registrant [sic] to me. I told him he was correct in seeking me, because I was the one. He informed me that during the Second World War he was in a similar position as mine. He had also refused to register for Selective Service because of his religious principles. He told me he had served a sentence, and was again convicted a second time, and served two sentences in various federal prisons.[5] I think at the time he asked me when I had come to my conclusion about registration. I mentioned at the time I was considering it the entire summer, the past summer, since the Act was made a law in the middle of June.
>
> * * * He also wished me the best of luck in the whole issue. At the time he also

[5] Actually, as later explained by petitioner from the witness stand, he was sentenced but once for refusing to register under the 1940 Selective Service Act, but his prison sentence was interrupted by a period of a few days during which he was at liberty on parole (see R. 147, 150–152).

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> asked me if I had heard any further from the draft board; if they had written a letter or sent me a questionnaire asking me to register once again. I told him no, I had received nothing.

A day or two later, according to Rickert, petitioner again asked him whether he had received (R. 101–102)—

> * * * any other word at all from either the Federal Bureau of Investigation or the Selective Service Board. That occurred frequently because the issue was on the table of course, and he was as interested, or nearly so, as I was.

Similar conversations occurred between petitioner and Rickert, according to the latter, "every few days, perhaps; sometimes maybe twice a day" (R. 102). In these conversations, petitioner kept inquiring of Rickert whether he had heard anything further from Selective Service authorities, recounted his own personal prison experiences, and advised Rickert as to what he might expect if sent to prison—"the kind of food," "the type of lighting," etc. (R. 108–109).

Petitioner himself gave like testimony as to the date of his first conversation with Rickert regarding the latter's refusal to register and as to the nature of that and subsequent conversations (R. 123–125, 137–145). He "congratulated" Rickert on learning of the latter's decision not to register; "told him that I too would refuse to

register; that I had refused to register in the last war"; and "probably told him good luck, as he left" (R. 123). Summarizing what he told Rickert in subsequent conversations on the subject, petitioner testified (R. 124, 125):

> Much that I told him concerned the type of future in store for him if he was convicted. He was curious about that. * * * A lot about prison routine and food and that sort of thing. Frequently it was merely a question of asking, "Has the government done anything or made a move"; so it was merely inquiries. A great percentage of these were inquiries. I would say we may have had prolonged conversations once a week, approximately.
>
> * * * * *
>
> I told him that we supported him; my wife and I agreed with him; we would also refuse to register for this draft if we were asked to do so; and we wanted as much as possible to identify ourselves with the men who were going to prison because our immunity rested with our age. I told him if at any point he felt his conscience directed him towards other actions, he should feel free to undertake another course of action. * * * I believe I told him that several times, because I was afraid my presence might influence him beyond his conscience if he were not clear; and I wanted to make sure he was clear.

On cross-examination, petitioner explained that, in saying he "wanted to make sure

[Rickert] was clear," he meant he wanted to be sure that Rickert was "inwardly prepared," as the result of deep conscientious conviction, to suffer the legal consequences of deliberate violation of the registration requirements of the Selective Service Act (R. 137–138). "I meant that the fact that I took this position and my wife took this position should not push him into continuing if at any moment he was not convinced he should continue, inwardly; * * * I was not sure whether he was as inwardly prepared as I am now that he is" (R. 142). "I have seen so many people cracking up when they take positions for which they are not ready. I have seen the prison system break conscientious objectors who were not prepared to take what they had to offer. * * * I do not want people who hold a position to be broken. * * * I wanted to make sure in this particular case he realized the consequences were heavy, because I had seen men become embittered" (R. 143).[6]

---

[6] Petitioner's testimony that he was careful to make sure that Rickert was "inwardly prepared" to accept the consequences of deliberate violation of the registration requirements of the law before he encouraged him in his stand should be weighed in the light of the fact that on August 25, 1948, as he admitted to agents of the Federal Bureau of Investigation (see *infra*, pp. 12–13), he delivered a speech to a group of "people of all ages," including men "of legal draft age," none of whom he knew personally, advocating "that men of draft age refuse to register under the Selective Service Act of 1948."

See also petitioner's letter of November 8, 1948, to the

3. On November 8, 1948, Special Agent William Tootell of the Federal Bureau of Investigation and Deputy Sheriff Loren Fairall, possessing a warrant for the arrest of Rickert for refusing to register, arrived at Ropp Hall on the Bluffton College campus for the purpose of taking Rickert into custody (R. 27–28, 29, 69). At the entrance to the dormitory, they met petitioner, who, upon learning the identity of the officers and the purpose of their visit, said to them, "Well, you cannot take Rickert unless you take my wife and me. We are just as guilty as he, for we told him not to register" (R. 28–29, 69–70).[7] The officers proceeded up a flight of stairs

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United States Attorney in Toledo (quoted in full at pp. 10–12, *infra*), in which he stated that "* * * We [petitioner and his wife] have openly urged young men to take this position [refusal to register] and shall do all in our power to further the cause of civil disobedience to conscription in this country. * * *"

[7] Petitioner testified that he said to the officers, "If you take Charles [Rickert], you will have to take my wife and me because we advocate the same position, and we would do the same thing" (R. 126).

Agent Tootell testified that on November 15, 1948, a week following the arrest of Rickert, when he and a fellow agent interviewed and took a statement from petitioner (see pp. 12–13, *infra*), he questioned petitioner regarding the latter's statement of November 8th that he had "told [Rickert] not to register"; and that petitioner then told him that he "might have said that in his excitement, but that it was not true; that in fact he had not known Mr. Rickert prior to September 10, 1948; and therefore could not have counseled him to refuse to register prior to that date" (R. 59; see also R. 31, 58–61, 76, 77–78, 113, 116–117, 128).

to Rickert's room and observed petitioner, who had gone ahead of the officers up a different flight of stairs (R. 126), "ushering Mr. Rickert from an adjoining room into his own room" (R. 29, 70). The officers followed into Rickert's room, where petitioner "placed his right hand on Mr. Rickert's left shoulder, and said, 'Stand by your principles. Do not let them coerce you into registering'" (R. 29, 70). The officers served the arrest warrant on Rickert, who willingly left with them (R. 29). As Rickert and the officers were leaving, petitioner said to Rickert, "Do not let them change your mind" (R. 70).[8]

4. On the same day on which Rickert was arrested, November 8, 1948, petitioner wrote the following letter, also signed by petitioner's wife, to the United States Attorney in Toledo (Gov. Ex. 8, R. 194–195):

> We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of

[8] Rickert testified that petitioner's statement was, "[D]o not let them coerce you into changing your mind" (R. 110). Petitioner was uncertain whether he used the words "your mind" or "your conscience" (R. 127).

young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.

This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government seems to us a terrible break with our American heritage of freedom. If one believes that war and conscription for war are crimes against humanity then he has a moral obligation to reject these practices and obey the moral law as he sees it. If the course that Charles and others like him have chosen is a criminal one, then we should also be prosecuted for committing a breach of the law. However, we do not believe that this is a criminal act and feel that the government should reject the idea of punishment in these cases. If our government continues to punish men of conscience then we shall do everything in our power to identify ourselves with these men and tell every American citizen of the persecution for

> righteousness' sake that is taking place in our land.[9]

5. On November 15, 1948, petitioner made the following voluntary statements to Agent Tootell and another F. B. I agent, who reduced them to writing (Gov. Exs. 2A and 2B, R. 190–191; R. 30–33, 43, 57–58, 74–81):[10]

> At 8 p. m. on or about August 25, 1948, I made a speech at a special meeting on Civil Disobedience held at the Friend's Meeting House located on North Sixth Street between Walnut and Washington Streets in Reading, Pennsylvania. This was an open meeting with people of all ages present. There appeared to be men present of legal draft age—ages 18 to 25, but I do not know the names and addresses of any of them.

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[9] This letter was admitted in evidence for the limited purpose of showing petitioner's intent in doing the act charged in the indictment (R. 47, 166–167).

Petitioner had previously, on September 30, 1948, written a letter of identical import to the Attorney General, protesting against a prison sentence imposed on a different conscientious objector for refusing to register (Gov. Ex. 7, R. 192–193). And subsequently, on November 12, 1948, he addressed a letter to the United States Attorney in Chicago, also of identical import, protesting against the arrest of yet another conscientious objector for refusing to register (Gov. Ex. 9, R. 195–196). These letters were likewise received in evidence exclusively for the purpose of showing intent (R. 47, 166–167).

[10] Petitioner did not sign this document because, he testified, he did not like its "tone" and wanted to "think it over" (R. 129). He did not deny, however, that he made the statements contained in it.

I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. In making this speech I intended to violate the Selective Service Act.

On November 8, 1948, I told Charles Ray Rickert of Ropp Hall, Bluffton, Ohio, "Stand by your principles, don't let them coerce you into registering." I made the above statement in the presence of Special Agent Tootell and a Deputy Sheriff of Allen County. At the time I made the above statement I knew Rickert was of draft age and that he had already refused to register for Selective Service on September 10, 1948.

Following the passage of the Selective Service Act of 1948 I signed an open letter entitled, "A Call to American Christians of Draft Age" published by the Peacemakers of 2013 Fifth Ave., New York 35, N. Y. This open letter advocates refusal to register for the draft.[11]

6. Petitioner testified that he was a pacifist and an active member of the Society of Friends,

[11] The first, second, and fourth paragraphs of petitioner's statement to the Agents, like his letters to the Attorney General and two United States Attorneys (see pp. 10–12 and fn. 9, supra), were admitted only for the purpose of showing the intent with which he did the act charged in the indictment (R. 44–46, 166–167).

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or Quakers (R. 118–120, 122); that, as such, he conscientiously felt that "wars are wrong, and that especially are wars wrong in our age, and really a form of race suicide" (R. 122); that he believed that a draft law is an immoral law, which people who are convinced of its immorality have an obligation to violate (R. 133); that he had espoused these views publicly in speeches he had made and an article he had written (R. 122); and that he had made it a point to become acquainted with all nonregistrants who are conscientiously opposed to conscription, and to support and identify himself with such persons if he felt they were "inwardly prepared" to assume the responsibilities and consequences of refusal to register (R. 137). He also testified that he had identified himself with, and that his views coincided with those of, the "Peacemakers," an "informal movement, including many, notably, Christian ministers" (R. 122), and that he had signed the following pledge (Gov. Ex. 3, R. 192; R. 63–65, 122):

> PEACEMAKERS, Mt. Morris House,
> 2013 Fifth Avenue, New York 35, N. Y.
>
> I am in agreement with the Open Letter [see p. 13, *supra*]. I shall do what I can to spread its message. If a youth of draft age, I plan not to register or serve under the Draft; if not, I shall in every way possible assist and support Non-registrants.

SUMMARY OF ARGUMENT

I

The evidence that petitioner counseled, aided, and abetted Rickert in his refusal to register under the Selective Service Act of 1948 is clear, and petitioner's attempts to deny the applicability of Section 12 (a) of that Act must fail.

A. It is of no consequence that Rickert had already refused to register before the date on which petitioner is alleged to have counseled a refusal, for Section 611.6 (d) of the Selective Service Regulations makes the duty to register a continuing one. This regulation, being a reasonable implementation of the duty to register prescribed by Section 3 of the Act, which specifically authorizes the promulgation of regulations, was validly issued. *Fogel* v. *United States*, 162 F. 2d 54, 55 (C. A. 5), certiorari denied, 332 U. S. 791.

The regulation does not, as petitioner contends, prescribe a penalty for refusing to register; the penalty is imposed by statute, and though the offense is a continuing one, it is single and not multiple and there is no merit in the argument that the regulation makes each day of refusal a separate crime.

The indictment accurately charged the crime of which petitioner was convicted; the record makes clear that, from the very beginning of the trial,

he was aware of the precise nature of the charge against him.

B. Petitioner's inconsistent argument that he could not be convicted of violating Section 12 (a) because Rickert had already complied with the registration requirements is equally baseless. When Rickert, before the date of the offense charged against petitioner, appeared before his draft board, he withheld information required for registration. While a person directed to register may comply notwithstanding his refusal to sign the registration card, there is no compliance where, in addition, the necessary information is denied the Board. Indeed, Rickert admitted that he had not registered and his plea of guilty to a charge of refusal to register resulted in his imprisonment.

C. On the record in this case, it was within the jury's province to find that petitioner told Rickert "not to register", and did not merely offer comfort or moral support to Rickert in the position he had been led by his conscience to take. Hence, no question is presented as to whether Section 12 (a) would reach the mere tender of "moral comfort" to a recalcitrant registrant. Petitioner constantly reiterated his purpose to violate the Selective Service Act, and his effort now to deny that he accomplished what he set out to do must come to naught.

II

On the assumption that the freedoms guaranteed by the First Amendment are absolute and unqualified, petitioner challenges the validity of Section 12 (a) of the Selective Service Act as applied to him to make punishable his expressions of religious conviction. But this challenge must fall with the assumption on which it is founded, for this Court has time and again rejected the absolutist theory of the First Amendment. See, *e. g., Reynolds* v. *United States,* 98 U. S. 145, 161–167; *Schenck* v. *United States,* 249 U. S. 47; *Cox* v. *New Hampshire,* 312 U. S. 569; *Prince* v. *Massachusetts,* 321 U. S. 158. Since it is plainly within the powers specifically conferred on Congress by the Constitution to penalize wilful refusal to register, regardless of the entertainment of religious scruples against registration (see *United States* v. *Macintosh,* 283 U. S. 605, 623–624), it is equally plain that Congress can constitutionally provide for the punishment of all who counsel others to refuse to register, even though such counsel derives from religious conviction. *Warren* v. *United States,* 177 F. 2d 596 (C. A. 10), certiorari denied, 338 U. S. 947.

III

Petitioner is driven then, albeit reluctantly, to reliance on the argument that the "clear and present danger" test is applicable and that the

conditions it imposes have not been fulfilled. But petitioner never complained to the trial court, as he does to this Court, of the failure of the trial judge to submit the question of clear and present danger to the jury. And even if petitioner could now complain of this failure, it is clear that words of counseling the commission of crime are among those "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572), much less any problem of "clear and present danger." Furthermore, petitioner's complaint would run afoul of *Gitlow* v. *New York,* 268 U. S. 652, 670–671. The statute here involves a specific prohibition against the use of language, *i. e.,* counseling refusal of registration. Consequently, the rule there announced, that when "the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration" governs here.

In any event, even if the "clear and present danger" test were applicable, its requirements have been fulfilled. The relationship between the petitioner and Rickert, dean and student,

makes it evident, even if it were not otherwise plain, that petitioner's counsel to Rickert "not to register" created a clear and present danger that Rickert would not register. And the substantive evil involved, interference with the process of conscription, is a serious one. *Falbo* v. *United States,* 320 U. S. 549, 551.

This Court has, moreover, given a sweeping answer to challenges of the sort petitioner makes here. In *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502, Mr. Justice Black, speaking for a unanimous court, said: "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

ARGUMENT

I

PETITIONER VIOLATED SECTION 12 (a) OF THE SELECTIVE SERVICE ACT OF 1948

On the statutory plane, petitioner's argument can be distilled into three distinct and sometimes contradictory contentions. He asserts that (1) since Rickert had refused to register before meeting petitioner, petitioner could not have been guilty of counseling, aiding, or abetting him in his refusal to register (Br. 24–26); (2) since Rickert had already done "whatever the law re-

quired him to do," *i. e.*, "to present himself for and submit to registration," petitioner could not properly be convicted of counseling, aiding, or abetting a refusal to register (Br. 26–27); and (3) since petitioner merely told Rickert to "follow his conscience," he cannot properly be said to have counselled, aided, or abetted a refusal to register (Br. 7, 10). These contentions are without merit.

A. *The duty to register which petitioner counseled, aided, and abetted Rickert to refuse to perform is validly made a continuing one by Selective Service Regulation 611.6 (d).*—Petitioner's view (Br. 24–26) is that he could not lawfully be convicted of counseling Rickert, on November 8, 1948, to refuse to register since Rickert had already refused to register, on September 10, 1948, the latter date being one of the two days fixed by Presidential Proclamation for persons of Rickert's age group to register (see pp. 3–4, *supra*). But Rickert's duty to register did not cease on September 10, 1948. It continued beyond that date, and existed on November 8, 1948, when petitioner, as charged in the indictment (*supra,* p. 2) and as established by the evidence (*supra,* pp. 9, 10), "told [Rickert] not to register." Section 611.6 (d) of the Selective Service Regulations (Appendix, *infra,* p. 57), then and still in force, provides:

> The duty of every person subject to registration to present himself for and

> submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

Petitioner, however, challenges the validity of the above regulation on the ground that it amounts to an encroachment on the legislative function of defining offenses and prescribing their penalties. He asserts that the regulation "fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to" the "fundamental law that only Congress can create a crime and fix its punishment" (Br. 28). This argument is baseless.

Section 3 of the Act (Appendix, *infra*, p. 54) imposes the duty of registration: "* * * [I]t shall be the duty of every male [person subject to its terms] * * * to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President *and by rules and regulations prescribed hereunder.*" [Italics supplied.] The regulation is a reasonable implementation of the duty so prescribed; it simply requires that a person who "for any reason" is not registered on the initial date or dates fixed for his registration

shall be under a continuing duty to register. The validity of a substantially identical regulation (§ 611.5 (d), 6 F. R. 6842) issued under the Selective Training and Service Act of 1940 was sustained in *Fogel* v. *United States,* 162 F. 2d 54, 55 (C. A. 5), certiorari denied, 332 U. S. 791. There, in a prosecution for wilful failure to register, commenced more than three years after the registration date fixed by Presidential Proclamation, the statute of limitations was set up as a bar to the prosecution. The trial court overruled the plea in bar, and Fogel was convicted and appealed. The Fifth Circuit affirmed. After referring to the regulation in question, the court observed (162 F. 2d at 55):

> * * * This regulation was notice to all persons that registration was a continuing obligation and that every day was a day for registration. The duty of Fogel to register being a continuing obligation, his failure to register was a continuing offense—an offense that continued right up to the date of the finding of the indictment. Therefore, the three-year statute of limitations did not operate to bar the prosecution.[12]

[12] See also *United States* v. *Guertler*, 147 F. 2d 796, 797 (C. A. 2), certiorari denied, 325 U. S. 879, holding that the failure of a registrant to keep his draft board advised of his address was a continuing offense. Similarly, other continuing failures to perform duties imposed by law have been held to constitute continuing offenses. *United States* v. *Belfast Fabrics Corporation*, 65 F. Supp. 567 (S. D. N. Y.)

Nor does the regulation, as petitioner argues, prescribe a penalty for the offense of refusing to

(failure to keep records as required by law); *United States* v. *Nazzaro*, 65 F. Supp. 456 (S. D. N. Y.) (concealment of assets of a bankrupt). The classic example of a continuing offense is conspiracy. *Hyde* v. *United States*, 225 U. S. 347, 369–370; *United States* v. *Kissel*, 218 U. S. 601, 607–608; *Blue* v. *United States*, 138 F. 2d 351, 360 (C. A. 6), certiorari denied, 322 U. S. 736; *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. A. 3), certiorari denied, 316 U. S. 678. A conspiracy is a "completed offense," in the sense that it is a punishable crime, upon the formation of the criminal agreement (and the commission of an overt act in furtherance of it, where the statute so requires); but the conspiracy, nevertheless, continues until its purpose is accomplished or abandoned (*United States* v. *Kissel*, *supra*, 218 U. S. at 607–608), or, as to any given conspirator, until he takes positive action to withdraw from the criminal venture (*Hyde* v. *United States*, *supra*, 225 U. S. at 369–370).

United States v. *Irvine*, 98 U. S. 450, relied on by the dissenting judge in the *Fogel* case (162 F. 2d at 56), is not in conflict with the *Fogel* decision. That case involved a prosecution for wrongfully withholding from a pensioner money owing her. The prosecution was commenced more than two years (the limitations period) after it had become evident that the withholding was deliberate and wrongful. This Court held the prosecution to be barred by the statute of limitations. But the offense in the *Irvine* case was not declared to be continuous in nature by the statute which created it (Act of July 4, 1864, c. 247, § 13, 13 Stat. 389), or by any regulation thereunder. In the *Fogel* case, on the other hand, as in the case at bar, a regulation duly promulgated under the controlling statute made the duty to register continuous, with the consequence that continued failure to register was properly held a continuing offense.

Compare *Warren* v. *United States*, 199 Fed. 753 (C. A. 5), holding that a prosecution under § 29 (b) (1) of the Bankruptcy Act of 1898, 30 Stat. 554, for concealing property of a bankrupt from the trustee, commenced more than one year after the act of concealment, was barred by the one-year

register. Section 12 (a) of the Act (Appendix, *infra*, pp. 56–57) defines the offenses and fixes the penalties. Although refusal to register is a continuing offense by virtue of the continuing duty imposed by the regulation, such refusal, contrary to petitioner's assertion, constitutes but one offense, and not a separate offense for each day the refusal continues.[13] The offense of con-

statute of limitations fixed by § 29 (d) of the Act. Thereafter, Congress, having amended § 29 (d) in 1926 to make the limitations period three years instead of one (Act of May 27, 1926, c. 406, § 11, 44 Stat. 665–666), again amended § 29 (d) in 1938 by adding the following *proviso* (Act of June 22, 1938, c. 575, § 1, 52 Stat. 840, 856): "*Provided*, That the offense of concealment of assets of a bankrupt shall be deemed to be a continuing offense until the bankrupt shall have been finally discharged * * *." See 11 U. S. C. [1946 ed.] 52 (d). In consequence of this legislative change, making concealment a continuing offense, it was held in *United States* v. *Nazzaro*, *supra*, 65 F. Supp. 456, that an indictment brought more than three years after concealment was not barred by the statute of limitations, the bankrupt not having in the meantime been discharged.

United States v. *Salberg*, 287 Fed. 208 (N. D. Ohio), involved a prosecution for failing to register under the Selective Service Act of 1917. The prosecution, commenced more than three years after the date on which the defendant should have registered, was held barred by the statute of limitations. But there, neither the statute nor any regulation thereunder, made the duty to register a continuing obligation. The case is thus plainly distinguishable from the *Fogel* case.

[13] Petitioner asserts that "the regulation has made each day of refusal of registration a separate crime" and argues, therefore, that, under the regulation, a person who refused for thirty days to register would be subject to imprisonment for 30 times the five-year maximum allowable term of imprisonment, and to a fine of 30 times the $10,000 maximum allow-

tinued refusal to register is, in this respect, like the offense of conspiracy. A conspiracy may continue from day to day, or even from year to year. But that characteristic of the offense does not make the crime multiple. As this Court observed in *United States* v. *Kissel, supra,* 218 U. S. at 607, "it is a perversion of natural thought and of natural language to call such continuous cooperation [among conspirators] a cinematographic series of distinct conspiracies, rather than to call it a single one." For the same reasons, it is a perversion of the plain language and meaning of Regulation 611.6 (d) to argue, as does petitioner, that the result of the regulation is to make continued refusal to register multiple offenses.

Regulation 611.6 (d) is valid as a reasonable implementation of the registration requirements of the Act. Accordingly, on November 8, 1948, Rickert was under a continuing duty to register. Petitioner's conduct in counseling Rickert to persist in his refusal to register was, therefore, squarely within the prohibition of Section 12 (a),

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able fine, fixed by Section 12 (a) of the Act, "contrary to the obvious intendment of the statute" (Br. 28). The absurdity of the suggested conclusion suffices to demonstrate the inaccuracy of the premise. The regulation does not make "each day of refusal of registration a separate crime," any more than it makes each hour or each minute of refusal to register a separate crime. It simply imposes a continuing duty to register. But the offense, though of a continuing nature, is one. Cf. *United States* v. *Kissel, supra,* 218 U. S. at 607.

and that was the statutory provision whose violation the indictment charged. The failure of the indictment in specific words to allege that petitioner counseled Rickert to *continue* to refuse to register, of which petitioner makes much (Br. 24–26), is not error at all. For an indictment such as this, charging violation of a specific statutory section which, in turn, refers to regulations to be issued thereunder, is certainly sufficient to apprise the defendant of the crime of which he is accused. Petitioner distorts the record, moreover, in asserting (Br. 26) that "the shifted charge was not known to petitioner until the instructions of the Trial Court were given." The facts are that almost the first word spoken at the trial was a reading by the United States Attorney, during his opening statement (R. 11), of Regulation 611.6 (d), imposing a continuing duty to register, and that the opening statement of defense counsel (R. 15–17) outlined the same argument—that petitioner could not counsel Rickert to refuse when he had already refused—as is made in this Court. Petitioner was not surprised by the judge's charge; his sole complaint was that he disagreed with it (R. 174–175).

This case is distinctly different from *Fogel* v. *United States,* 335 U. S. 865, reversing on the Government's confession of error, 167 F. 2d 763 (C. A. 5). There, Fogel was charged with being under 45 years of age and having failed to register, as required, on February 16, 1942. He was

sought to be convicted on the ground that, being over 45, he was required, but nevertheless, failed to register on April 27, 1942. "The whole controversy in [Fogel's] trial was whether he was under 45, or over 45." 167 F. 2d at 765. When it appeared from evidence made available after judgment of conviction that Fogel was over 45, this Court refused to allow his conviction, based on the premise that he was under 45, to stand. There was no such changing of ground in this case as there was in Fogel's.

B. *Rickert had not already complied with the registration requirements of the Act when petitioner counseled a refusal to register.*—Petitioner contends that his conviction of counseling Rickert, on November 8, 1948, to continue his refusal to register, was logically impossible because Rickert had in fact already registered, on September 10, 1948 (Br. 26–27). It will be observed that this contention is inconsistent with petitioner's other contention, answered under A, *supra,* pp. 20–27, that he could not properly be convicted of counseling Rickert, on November 8, 1948, to refuse to register, since Rickert had already *refused to register* on September 10, 1948. But apart from its lack of consistency, it is clear that there is no substance in the contention.

Rickert did not register on September 10, 1948, or at any other time. He himself admitted at petitioner's trial that he did not register (R. 97), and in fact he pleaded guilty to an indictment

charging him with refusal to register, and was sentenced to 18 months' imprisonment therefor (see fn. 4, *supra,* p. 4). He appeared before his draft board on September 10, 1948, and gave the board his name, address, and the year of his birth, but he refused to give any of the other information necessary to register him under the Act (see p. 4, *supra*). This manifestly did not constitute compliance with the duty imposed by Section 3 of the Act "to present himself for and submit to registration." It is true that where a person appears before his local board and gives the registrar all the information needed to register him, but "is unable or refuses to sign the Registration Card", the regulations provide that the registrar shall sign the registrant's name for him and that "the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card * * *, and such registrant shall thereby be registered." See §§ 613.11 and 613.13 of the Selective Service Regulations (Appendix, *infra,* pp. 57–58). But it is clear from Regulation 613.16, *infra,* p. 59, that where any information needed to register a person is withheld by him, he does not comply with the registration requirements and is not registered. It was solely the failure of the Government to prove more than the defendant's refusal to sign his registration card—that is, the failure to prove that he "refused to give all information necessary for the registrar to make the

required entries on the registration card"—that resulted in the reversal of a conviction of a refusal to register in *United States* v. *Norton,* 179 F. 2d 527, 529 (C. A. 2). Petitioner's reliance on that decision is therefore plainly misplaced.

C. *Petitioner did not simply advise Rickert to follow his conscience wherever it might lead him; he counseled, aided, and abetted a refusal to register.*—Petitioner contends that he could not be convicted of violating Section 12 (a) because he simply told Rickert to "follow his conscience". He urges that Congress, in proscribing counseling, aiding or abetting a refusal to register, did not intend to reach the giving of "moral comfort". See Br. 18, 7, 10, 19–20, 21.

The short answer to this contention is that it is not presented by the record in this case. As the court below stated: "We do not have a mere attempt on appellant's part to comfort or give moral support to some one who is paying the penalty for his refusal to register" (R. 207). The jury was entitled to find not merely that Rickert was advised to "follow his conscience", but that petitioner "congratulated" him on his refusal (R. 123), "supported him" (R. 125), and "told him not to register" (R. 70). Such explanations as petitioner offered for his statement to the arresting officers that he had "told [Rickert] not to register" (see *supra,* fn. 7, p. 9) were undoubtedly weighed by the jury in the light of petitioner's letters to United States Attorneys,

and the Attorney General, and a speech delivered to a group including men of draft age. In the letters, petitioner stated: "we have advocated disobedience to the law" (R. 194); "my wife and I would both refuse to register for the draft if we were asked to do so. I have publicly advocated this position and shall continue doing all in my power to further the cause of civil disobedience in this country" (R. 196); "my wife and I have been publicly and openly advocating that Christians should disobey the draft law and will encourage any young man that we know is taking this position" (R. 193). Of his speech, petitioner said: "I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. *In making this speech I intended to violate the Selective Service Act.*" [R. 190–191, italics supplied.] It is clear that petitioner did what he intended to do.

II

SECTION 12 (a) OF THE SELECTIVE SERVICE ACT OF 1948, MAKING IT AN OFFENSE FOR ANY PERSON KNOWINGLY TO COUNSEL ANOTHER TO REFUSE TO REGISTER UNDER THE ACT, IS VALID AS APPLIED TO CONSCIENTIOUS OBJECTORS TO WAR AND CONSCRIPTION

Petitioner contends that the First Amendment, proscribing the making of any law prohibiting the free exercise of religion or abridging free-

dom of speech, stands as a constitutional bar to the enforcement against him, a conscientious objector on religious grounds to war and conscription, of Section 12 (a) of the Selective Service Act of 1948, making it an offense for any person knowingly to counsel another to refuse to register under the Act (Br. 7–16). But this contention is founded on the mistaken assumption, rejected as often as it has been advanced in this Court,[14] that the freedoms guar-

[14] See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145, 161–167 (sustaining as against religious believers in polygamy, a federal statute making the contraction of a polygamous marriage a crime); *Schenck* v. *United States*, 249 U. S. 47 (sustaining the Espionage Act of 1917, making criminal the obstruction of recruiting in wartime, as applied to the circulation of a document criticizing conscription in impassioned language); *Frohwerk* v. *United States*, 249 U. S. 204 (same; newspaper articles); *Debs* v. *United States*, 249 U. S. 211 (same; speech); *Abrams* v. *United States*, 250 U. S. 616 (same; pamphlets); *Schaefer* v. *United States*, 251 U. S. 466 (same; newspaper articles); *Gitlow* v. *New York*, 268 U. S. 652, 666–671 (sustaining a state statute making it a crime to advocate the violent overthrow of organized government); *Whitney* v. *California*, 274 U. S. 357, 371–372 (same); *Cox* v. *New Hampshire*, 312 U. S. 569 (sustaining a state statute requiring that all street parades be licensed and regulated, as against a religious group conducting such a parade); *Prince* v. *Massachusetts*, 321 U. S. 158 (sustaining a state statute prohibiting children from selling magazines, etc., in public places, as against a member of a religious group with whose religious convictions compliance with the statute interfered). See also *Davis* v. *Beason*, 133 U. S. 333, 342–343; *Mormon Church* v. *United States*, 136 U. S. 1, 50; *DeJonge* v. *Oregon*, 299 U. S. 353, 363–365; *Herndon* v. *Lowry*, 301 U. S. 242, 256–261; *Schneider* v. *State*, 308 U. S. 147, 160–161; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304, 308; *Cha-*

anteed by the First Amendment are absolute and unqualified. As this Court pointed out in *Davis* v. *Beason,* 133 U. S. 333, 342-343—

> * * * The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others * * *. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be

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plinsky v. *New Hampshire*, 315 U. S. 568, 572; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110; *Martin* v. *Struthers*, 319 U. S. 141, 143; *Board of Education* v. *Barnette*, 319 U. S. 624, 633, 639.

> subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. * * * [15]

What petitioner's argument overlooks is that the same Constitution whose First Amendment he invokes confers on Congress the power to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Art. I, Sec. 8, Appendix, *infra*, p. 53). And since "the mind cannot conceive an army without the men to compose it," the cited provisions plainly bestow on Congress the power to build an armed force by the processes of conscription. *Selective Draft Law Cases*, 245 U. S. 366, 377.

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[15] Compare: * * * Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * * [W]hen the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made * * * (*Reynolds* v. *United States*, 98 U. S. 145, 166–167).

* * * No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect * * * (*Cantwell* v. *Connecticut*, 310 U. S. 296, 308).

* * * One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command * * * (*Cox* v. *New Hampshire*, 312 U. S. 569, 574).

Registration under a draft law being the first and an indispensable step in the conscriptive process—the means whereby the Government inventories and classifies the Nation's available manpower—it is clear that Congress can constitutionally compel all men, within such age limits as it may see fit to specify, to register for selective service, and no religious or conscientious scruple against registration, however deeply or sincerely entertained, can exempt a person from the duty of registering, where Congress has not done so. *Richter* v. *United States,* 181 F. 2d 591, 592–594 (C. A. 9); *United States* v. *Henderson,* 180 F. 2d 711, 713–716 (C. A. 7), certiorari denied, 339 U. S. 963. And since Congress can penalize wilful refusal to register, regardless of the entertainment of religious scruples against registering, it is equally plain that Congress can constitutionally provide for the punishment of all who counsel others to refuse to register, notwithstanding that the persons so counseling may conceive it their religious duty to do so.[16] *Warren* v. *United States,* 177 F. 2d 596 (C. A. 10), certiorari denied, 338 U. S. 947; *Baxley* v. *United States,* 134 F. 2d 937, 938 (C. A. 4); *Fraina* v. *United States,* 255

[16] It is to be noted that Congress, by specifically providing for punishment of any person "who knowingly counsels, aids, or abets another to refuse or evade registration" (Section 12 (a), *infra*, pp. 56–57), has made such counseling, aiding, or abetting "a primary and not an accessorial offense" (*Warren* v. *United States*, 177 F. 2d 596, 598 (C. A. 10), certiorari denied, 338 U. S. 947).

Fed. 28, 36 (C. A. 2). As remarked in *Warren* v. *United States, supra,* 177 F. 2d at 599–600:

> It is one thing for a person to entertain religious beliefs, to express those beliefs, and to teach them to his children. It is another thing to counsel and urge violation of valid penal legislation. "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it [the First Amendment] safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society" [citing *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304].

It is important to emphasize that this case presents no question as to the power of Congress under the Constitution to compel military service by conscientious objectors to warfare in any form.[17] For Congress has never sought to do so.

[17] The existence of this power, however, is not to be doubted. *In re Grimley,* 137 U. S. 147, 153; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29; *United States* v. *Macintosh,* 283 U. S. 605, 623–624. "This [contention that it is a "fixed principle of our Constitution" that a citizen cannot be compelled to bear arms "if he has conscientious religious scruples against doing so"], if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious

See *Girouard* v. *United States*, 328 U. S. 61, 69. Section 6 (j) of the present Act (Appendix, *infra*, pp. 54–56) specifically exempts conscientious objectors from combatant service, and, indeed, from noncombatant service if the conscientious objection extends to that type of service as well.[18]

objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general" (*United States* v. *Macintosh*, *supra*, 283 U. S. at 623–624). And see pp. 38–43 of the Government's brief in *Girouard* v. *United States*, No. 572, O. T. 1945, wherein are collected historical materials showing that a proposed constitutional amendment exempting conscientious objectors from the duty to bear arms failed of adoption, after due consideration.

Petitioner does not now challenge the power of Congress to enact a so-called "peacetime draft," Br. 14.

[18] The challenge in the petition for certiorari (p. 12), not repeated in petitioner's brief on the merits, of Section 6 (j) as a "law respecting an establishment of religion," within the proscription of the First Amendment, because it limits exemption from military service to those conscientiously opposed to war "by reason of religious training and belief," which is defined as "an individual's belief *in a relation to a Supreme Being*, &c." [italics supplied], is plainly not raisable in a case, such as this, involving prosecution for refusal

And the subsection carefully safeguards the rights of registrants claiming to be conscientious objectors in consequence of religious conviction, whose claims are not sustained by their local boards, by setting up adequate appeal machinery. But petitioner's offense was counseling another to refuse even to register, *i. e.*, to be enrolled for classification purposes under the Act. Clearly, for the reasons stated, nothing in the First Amendment restrains Congress from imposing that requirement or from penalizing those who counsel disobedience of it.

III

THE "CLEAR AND PRESENT DANGER" TEST IS NOT APPLICABLE, BUT, IN ANY EVENT, ITS REQUIREMENTS HAVE BEEN FULFILLED

The trial court instructed the jury, in pertinent part, as follows (italics supplied):

> You are further charged that it is not necessary in this case for the government to prove that the counseling, aiding and abetting charged against Larry Gara ac-

or counseling refusal *to register*. See *Richter* v. *United States*, 181 F. 2d 591, 594 (C. A. 9): "Appellant, in addition to the foregoing contentions, challenges the constitutional validity of the exemption and conscription provisions of the Selective Service Act [of 1948]. The registration provisions, which he violated, are, however, separable from the other provisions of the statute, and until compliance with the registration requirements, at least, he has no standing to attack the other sections to which he has not as yet made himself subject, and to which he might never be subject."

tually accomplished its purpose by way of causing Charles Ray Rickert to refuse or evade registration. The Act does not so require. The Act merely says "any person who knowingly counsels, aids or abets another to refuse or evade registration." The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they *would have a tendency to cause a refusal of duty as required by the Act* * * * [R. 167].

* * * * *

* * * In its wisdom Congress has provided * * * that any person who knowingly counsels, aids or abets another to refuse or evade registration or service in the armed forces * * * shall, upon conviction, be punished as thereinafter provided. This was and is a prerogative of the Congress, and the right of free speech does not extend to such a point as to permit an individual to knowingly violate the law and then excuse the violation by alleging a reliance upon the First Amendment to the Constitution which grants him the right of free speech [R. 168].

* * * You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948, under the circumstances then and there present, was of such a nature that it *had a tendency to encourage or cause Rickert to continue his refusal to register under the Selective*

Service Act of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the second count of the indictment [R. 169].

* * * * *

You are instructed that * * * Rickert, having refused to register on September 10, 1948, which was the day prescribed for men of his age, had the continuing duty to register after that date and on November 8, 1948; and if you find * * * that the defendant on November 8, 1948, counseled, aided or abetted Rickert to evade or refuse registration or in continuing his refusal to register, and that the defendant did so knowingly, * * * or if the natural and probable effect of what the defendant said to Rickert on November 8, 1948, under the circumstances there and then present, was of such a nature that it *had a tendency to cause Rickert to continue his refusal to register under the Selective Service Act of 1948,* whether or not it actually had that effect, you will find the defendant guilty as charged in the second count of the indictment [R. 172].

Petitioner contends (Pet. 13–14; and cf. Br. 20–23 with Br. 14–17) that the italicized portions of the quoted instructions, *supra*—authorizing the jury to find him guilty if his words to Rickert on November 8, 1948, "had a tendency" to cause Rickert to continue his refusal to register—were erroneous

because violative of the "clear and present danger" doctrine. This doctrine he also rejects as an invalid tempering of the absolutism of the First Amendment, but he is willing *arguendo,* to assume its constitutional justification (Br. 16). So assuming, he argues, apparently, that he was entitled to have the jury instructed that he could be found guilty only if, in the opinion of the jury, his words to Rickert created a "clear and present danger" that they would bring about the substantive evil—refusal to register by one bound to register under the Act—which Congress sought, and had a right to seek, to prevent. There are at least four answers to this contention.

First, no such contention was presented to the trial judge at the time of the instruction.[19] The only objection to the instructions, of possible present relevance, was as follows (R. 175): "The court in a number of parts of its charge has referred to clear and present danger. We except to that because in this case there is no evidence of clear and present danger."[20] This clearly did not

[19] See Rule 30, F. R. Crim. P., providing: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

[20] The passages of the instructions to which reference was made were as follows:

"You are instructed that words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances

raise the point now urged, that the question of "clear and present danger" should have been submitted to the jury.

Secondly, as pointed out in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" for the reason that they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Counseling the commission of crime—whether the crime be murder (cf. Mr. Justice Holmes, dissenting in *Abrams* v. *United States,* 250 U. S. 616, 627) or any other crime—would seem clearly to be an utterance of this type. The criminality of crime-counseling is as old as the common law,[21] and, at least since the adoption

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as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent [R. 168].

* * * * *

"You are instructed that it is the law that although one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection. * * *" [R. 169.]

[21] At common law, one who procured, commanded, or counseled the commission of any crime was an accessory

of the Criminal Code of 1909, Federal statutory law has made no distinction between one who counsels the commission of a crime and the principal.[22] In the light of this history, we submit, it is idle to contend that the punishment of counseling the commission of a specifically defined offense raises any First Amendment problem, much less any problem of "clear and present danger."

Thirdly, that the "clear and present danger" test has no application in a case of this type—where Congress has specifically prescribed utter-

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before the fact to its commission (Clark and Marshall, *Law of Crimes* (4th ed. 1940), §§ 169–174) and was liable to the same punishment as the principal. *Id.*, § 158.

[22] Section 332 of the Criminal Code of 1909 (18 U. S. C. [1946 ed.] 550; now 18 U. S. C. 2 (a)) provided: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

As early as 1790, Congress made it an offense punishable by death for any person to "aid and assist, procure, command, counsel, or advise" the commission of murder, robbery, or piracy on the high seas (Act of April 23, 1790, c. 9, § 10, 1 Stat. 114; later revised and codified as § 5323 of the Revised Statutes). In 1870, Congress provided that anyone who should "aid or abet * * * or counsel, advise, or procure" the commission of any of certain designated offenses relating to the naturalization of aliens should be "liable to indictment and punishment in the same manner and to the same extent as the principal party guilty of such felony" (Act of July 14, 1870, c. 254, § 2, 16 Stat. 254–255; later revised and codified as § 5427 of the Revised Statutes). The general aider-and-abettor statute (Criminal Code, § 332, *supra*) was derived from these earlier statutes, which were limited in their application to certain specific types of offenses.

ances of the kind sought to be punished—is clear from this Court's holding in *Gitlow* v. *New York,* 268 U. S. 652. In Section 1 (b) of the Selective Service Act (Appendix, *infra,* p. 53), Congress has declared that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." In implementation of this solemnly declared need, it has provided for the building up of an adequate armed force by the process of conscription: "Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six * * * shall be liable for training and service in the armed forces of the United States" (Section 4 (a), Appendix, *infra,* p. 54). As the first step in the conscriptive process, it has imposed the duty of registration on "every male citizen of the United States, and every other male person residing in the United States, who * * * is between the ages of eighteen and twenty-six" (Section 3, Appendix, *infra,* p. 54). Finally, to insure the success of the program, it has declared it to be a punishable offense, not only to evade or refuse registration or service, but *knowingly to counsel* another to evade or refuse registration or service (Section 12 (a), Appendix, *infra,* pp. 56–57).

Unlike the statutory language involved in *Schenck* v. *United States,* 249 U. S. 47 (cause insubordination and obstruct recruiting), the words

used in Section 12 (a) embody a specific prohibition against the use of language—counseling—designed to dissuade persons required to register under the Act from registering. The inclusion of such a prohibition is manifestly a reasonable and appropriate means to achieve the end of insuring that all male persons within the specified age limits be registered for inventory and classification purposes. As we have shown (*supra*, pp. 30–37), the draft program as a whole, and the specific prohibition, in particular, against utterances counseling non-registration, were plainly within the constitutional power of Congress to enact. This being so, as this Court pointed out in the *Gitlow* case, 268 U. S. at 670–671, the proscription against counseling—

> * * * may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. * * * *In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be consti-*

tutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. [Citing *Schenck* v. *United States,* 249 U. S. 47, 51; and *Debs* v. *United States,* 249 U. S. 211, 215, 216.] And the general statement in the *Schenck* case (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger

> that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.[23] [Italics supplied.]

Finally, even if the "clear and present danger" test were applicable here, its requirements have been fulfilled. The issue on this aspect of the case would be whether there was a clear and present danger that petitioner's counsel to Rickert would result in Rickert's refusal to register and whether that and its concomitants would be a sufficiently serious substantive evil to

[23] To the same effect, see *Whitney* v. *California*, 274 U. S. 357, 371–372, which also pointed out (p. 371) that the legislative determination that specified acts or utterances should be punished "must be given great weight. Every presumption is to be indulged in favor of the validity of the statute * * *; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." And see *Bridges* v. *California*, 314 U. S. 252, 260–261, where, in distinguishing the *Gitlow* case, this Court pointed out that "here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation."

warrant repression of speech (*Bridges* v. *California,* 314 U. S. 252, 263). The answer, we submit, is clear. Were the speaker's relationship with his auditor a less intimate one, were his influence on the person being counselled less strong than that of dean on student, the question might be more difficult. But when, as here, the dean advises his student "not to register" (see *supra,* pp. 9, 10), seeks "as much as possible to identify [himself] with" Rickert (R. 125), and advises him to "stand by your principles" (R. 29), the danger of continued and firmer resistance to registration is clear and present if those words have any meaning. And the danger certainly relates to an evil which Congress has a right to prevent—refusal to register under a draft law. See *supra,* pp. 30–37.

Nor can the interest of the Government in enforcement of its selective service law "be classified as an effort to outlaw only a slight public inconvenience or annoyance." *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502; cf. *Schneider* v. *State,* 308 U. S. 147. When the Selective Service Act of 1948 was passed and when this case was tried, the "danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from

apathy and delay was well understood." *Falbo* v. *United States,* 320 U. S. 549, 551.

The evil attendant on Rickert's refusal to register and the support others might derive from the stand petitioner counseled Rickert to take is hardly less serious than the breach of peace deemed sufficient in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, or the violation of state anti-trust laws found adequate to justify repression in *Giboney* v. *Empire Storage Co.,* 336 U. S. 490. Indeed, from a recent cataloguing by this Court of the evils held sufficiently serious to warrant intrusions on freedom of speech, it appears that few, if any, have been more grave than that here involved. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 398:

> * * * the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the

> health of children, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), or of the whole community, *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905), and it may be offensive to the moral standards of the community, *Reynolds* v. *United States,* 98 U. S. 145 (1878); *Davis* v. *Beason,* 133 U. S. 333 (1890). And Government's obligation to provide an efficient public service, *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), and its interest in the character of members of the bar, *In re Summers,* 325 U. S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment.

Moreover, when, as here, the evidence of petitioner's purpose to violate the Selective Service Act is as clear as it is (see *supra,* pp. 10–14), it may very well be that that specific intent is a substitute for, or equivalent to, a finding of clear and present danger. As Mr. Justice Holmes, dissenting in *Abrams* v. *United States,* 250 U. S. 616, 627–628, put it:

> I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck, Frohwerk,* and *Debs,* 249 U. S. 47, 204, 211, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces *or is intended to produce* a clear and imminent danger that will bring about forth-

with certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all efforts to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. *Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt.* So I assume that the second leaflet if published for the purpose alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift*

> *& Co.* v. *United States,* 196 U. S. 375, 396. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged. [Italics supplied.]

And in *Whitney* v. *California,* 274 U. S. at 373, Mr. Justice Brandeis, concurring, stated that—

> * * * the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce,* a clear and present danger of some substantive evil which the State constitutionally may seek to prevent * * *. [Italics supplied.]

It is significant that in *American Communications Association* v. *Douds,* 339 U. S. 382, 395, this Court quoted with approval this statement of Mr. Justice Brandeis.

Because words "used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control", and because "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"

(*Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502), it is evident that the "clear and present danger" test, if at all applicable to this case, has been met.[24]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1950.

[24] Petitioner also argues that Section 12 (a) of the Act, providing for the punishment of any person "who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces" (Appendix, *infra*, p. 56), is "void for vagueness" (Br. 17–20). But the prohibition, it seems to us, is phrased as clearly and unambiguously as language permits. In the light of the usage at common law, and in our statutes since the beginning of the nation, of the words "counsel, aid, or abet" (see pp. 41–42, *supra*, and fns. 21 and 22), it is evident that petitioner's contention that a statute embodying these words is too indefinite has long since been put to rest by centuries of application of those words to describe acts criminally punishable. Cases like *Connally* v. *General Construction Co.*, 269 U. S. 385, and *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (cited by petitioner, Br. 17), declaring invalid the statutes there involved as lacking ascertainable standards of guilt, are plainly inapposite.

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article I, Section 8, of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
> * * * * *
> To declare War * * *;
> To raise and support Armies * * *;
> To provide and maintain a Navy;
> * * * * *
> And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The First Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *.

The Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604, *et seq.*, provides in pertinent part:

> SECTION 1 [50 U. S. C. App., Supp. III, 451]. * * *
> (b) The Congress hereby declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.
> * * * * *

SEC. 3 [50 U. S. C. App., Supp. III, 453]. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

SEC. 4 [50 U. S. C. App., Supp. III, 454]. (a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 3 of this title, shall be liable for training and service in the armed forces of the United States. * * *

* * * * *

SEC. 6 [50 U. S. C. App., Supp. III, 456]. * * *

* * * * *

(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior

to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained.

The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10 [50 U. S. C. App., Supp. III, 460]. * * *

* * * * *

(b) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this title;

* * * * *

SEC. 12 [50 U. S. C. App., Supp. III, 462]. (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years

or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

* * * * *

Section 611.6 (d) of the Selective Service Regulations, issued on July 20, 1948 (E. O. 9979, 13 F. R. 4177, 4180; now codified as 32 C. F. R. (1949 ed.) 1611.6 (d)), provides:

§ 611.6 *Responsibility for performance of duty.* * * *

(d) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

* * * * *

Sections 613.11, 613.13, and 613.16 of the Selective Service Regulations, issued on August 2, 1948 (13 F. R. 4535–4536; now codified as 32 C. F. R. (1949 ed.) 1613.11, 1613.13, and 1613.16, respectively), provide in pertinent part:

§ 613.11 *Interview of the registrant.* (a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.

* * * * *

(c) The registrar shall ask the registrant for the information necessary to complete the entries on lines 1 to 15, inclusive, of the Registration Card (SSS Form No. 1), and shall enter such information on the proper lines of the card. * * *

* * * * *

§ 613.13 *Registrant's signature.* (a) When the provisions of §§ 613.11 and 613.12 have been carried out, the registrar shall have the registrant verify the correctness of the entries on the Registration Card (SSS Form No. 1).

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of _____ made in my
(Name of registrant)
presence" and shall sign his own name thereunder, followed by the word "Registrar."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

* * * * *

§ 613.16 *Recalcitrants.* If a registrant refuses to cooperate or is inclined to evade, refuses to answer, or to answer falsely, his attention should be called to the penal provisions of Title I of the Selective Service Act of 1948. If he is still refractory, witnesses should be called, and after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1950

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 19

LARRY GARA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

LARRY GARA,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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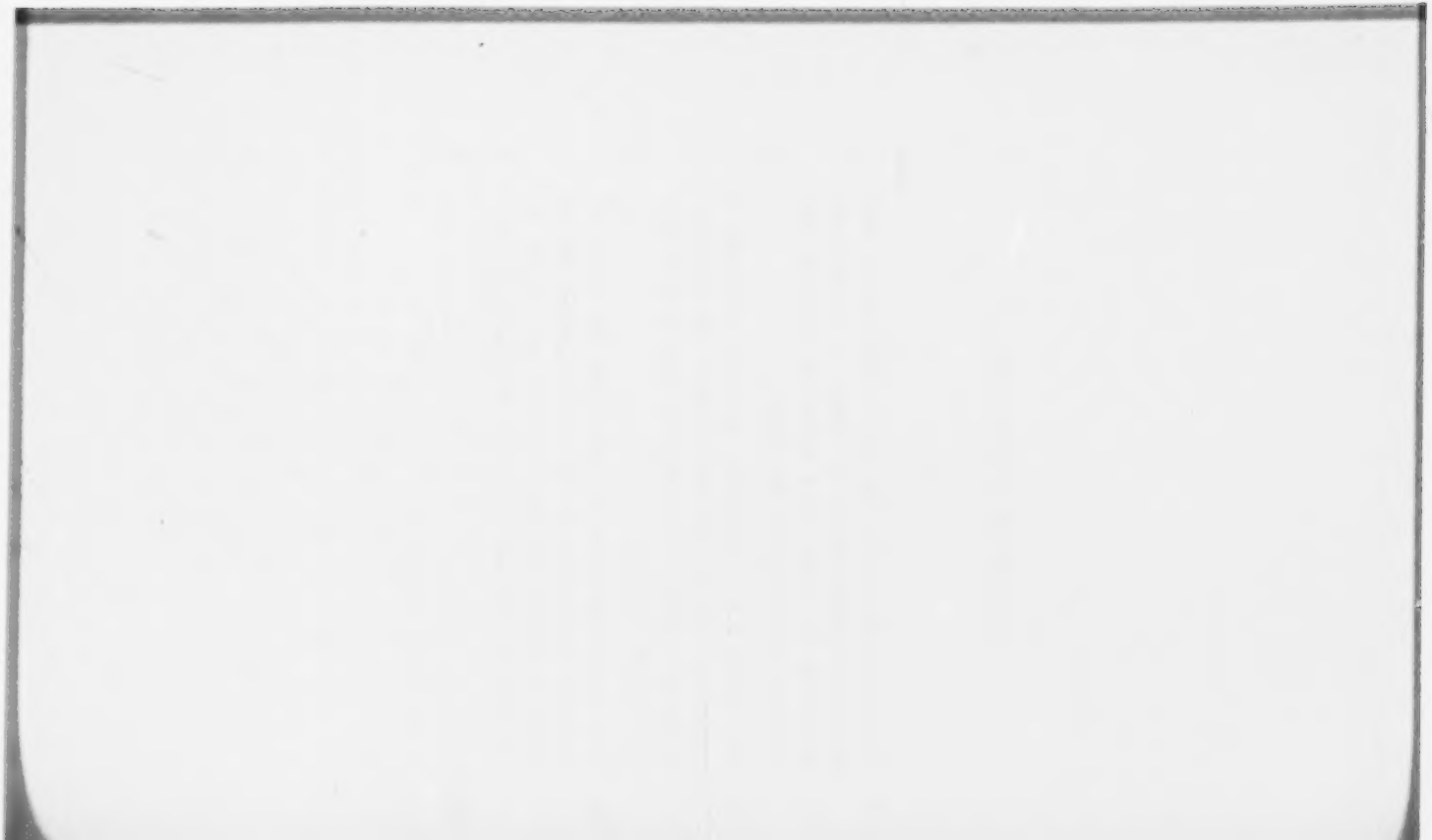

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PETITION FOR REHEARING.

To the Justice of the Supreme Court of the United States:

The petitioner respectfully asks the court to withdraw its decision rendered on the 23rd day of October, 1950, and to grant a rehearing because of errors of law and facts contained therein.

The decision now asked to be withdrawn is as follows:

> "PER CURIAM: The judgment is affirmed by an equally divided court. Mr. Justice Clark took no part in the consideration or decision of this case."

I. The Court Having by the Above Decision in Fact Upheld the Judgment of the Court of Appeals of November 28, 1949, Thus Failed to Consider the Questions Presented by This Case.

It is respectfully urged that the Court has misconceived and failed to consider the questions presented by this case.

Petitioner contended in his brief in this case that "In advising and instructing the jury, the Trial Court in effect held that the petitioner could and must be convicted for telling one of his students to follow his conscience." (Page 7 of Brief of Petitioner.) The government in its brief contra-contended that "On the record in this case, it was within the jury's province to find that petitioner told Rickert "not to register", and did not merely offer comfort or moral support to Rickert in the position he had been led by his conscience to take." (Page 16 of Brief for the United States.)

The Court of Appeals stated in its opinion (Record Page 207):

> "The case argued by appellant in many ways is based upon a different set of facts from those presented here. We do not have a mere attempt on appellant's part to comfort or give moral support to someone who is paying the penalty for his refusal to register."

Some of the members of this Court were apparently under the impression that the jury found that Gara "told Rickert not to register", instead of finding that Gara told Rickert to follow his conscience, or gave Rickert mere comfort or moral support. Mr. Justice Minton asked during oral argument: "Isn't it true that Gara told Rickert not to register? Wasn't that the issue submitted to the jury?", or words to that effect.

We submit that under well-recognized principles of law this Court must decide this case on the assumption that all the jury found as a fact was that Gara told Rickert to follow his conscience, or that Gara gave comfort or moral support to Rickert in the position Rickert had been led by his conscience to take. This case must be so considered for the *fundamental reasons* that:

(1) Gara was not allowed, by the Trial Court, to

introduce evidence tending to show that he did no more than tell Rickert to follow his conscience, or that he merely gave Rickert comfort or moral support in the position Rickert had been led by his conscience to take. The Trial Court, in excluding this evidence, ruled that this was immaterial and would not lessen the offense.

(2) The jury was told by the Trial Court, in effect, that Gara must be convicted even though he merely told Rickert to follow his conscience or simply gave Rickert comfort or moral support in the position Rickert had been led by his conscience to take.

After the government had introduced letters, a pledge, and an unsigned statement referring to a speech Gara had made, for the purpose of showing Gara's frame of mind, or his intent in doing the act he was charged with doing[1], Gara made repeated attempts to introduce evidence to the jury which would tend to rebut this evidence, and would tend to show that Gara would only comfort or support those who were "inwardly prepared" for a non-registrant stand.

Beginning on page 66 of the record, Mr. Heisler was attempting to introduce in evidence, over objection by the government, part of a properly-identified pamphlet which the government had introduced as a mutilated exhibit, only part of it being allowed to go to the jury. At this point, the following appears in the record:

"The Court: What is the purpose of this?

Mr. Heisler: That there was a conversation between this man and the defendant concerning the basic philosophy and underlying conduct of the defendant; to show that notwithstanding this witness' recollec-

1. The jury was instructed to "consider this evidence as having been admitted only for the purpose of enabling the jury to obtain some index into the mind of the defendant on the question of his intent when it is charged that he *knowingly* counseled, aided and abetted another person to refuse or evade registration". (Record Page 167.)

tion about being inwardly prepared, it could not have been otherwise; that if Mr. Gara subscribed to the contents of this pamphlet, obviously he would not have gone out and preached on the highways and byways, but *was going to pick those people to talk to who were inwardly prepared.*

The Court: Does that lessen the offense?

* * * * *

The Court: I will sustain the objection."

Again on page 85 of the record, Gara attempted to introduce testimony of Robert Amstutz to the effect that Gara had told Amstutz to complete registration because Amstutz was not inwardly prepared for a non-registrant stand. The Court sustained an objection to this testimony, and the testimony is in the record only by way of offer of proof. It was never presented to the jury.

It is true that this testimony concerned acts other than the one with which Gara was charged, but so did the letters, pledge, and part of the unsigned statement presented as evidence by the government. If the Trial Court had felt that this evidence of intent was material, it should have admitted it to rebut the different evidence of intent presented by the letters, pledge and unsigned statement introduced and admitted in evidence for the government. The only reason the Court had for keeping this evidence out was that the fact that Gara would support only those who were "inwardly prepared" did not "lessen the offense", in the view of the Trial Court.

Similar rulings are sprinkled liberally throughout the entire record. The jury was not allowed to hear or weigh evidence tending to show that Gara would support only those who were inwardly prepared, and it was repeatedly impressed with the fact that the Trial Court considered that such evidence concerned facts which, if true would not "lessen the offense."

II. The Court Has Completely Ignored Petitioner's Contention That He Has Been Denied the Constitutional Protection of Freedom of Speech and Free Exercise of Religion.

In instructing the jury at the conclusion of the trial, the Trial Court stated (Record page 167):

> "The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they would have a *tendency* to cause a refusal of duty as required by the Act."

In defining the terms "aiding" and "abetting", as used in the statute and the indictment, the Court told the jury that: "To aid is to support." (Record page 168.)

Then to make sure that the jury understood that it must convict Gara taking all the facts most favorable to him, the Court said (Record page 169):

> *"It is the apparent contention of the defendant that he did not counsel,* aid or abet Rickert in his refusal to register on September 10, 1948, *but merely that he supported him in his attitude after he, Rickert, had decided in his own mind not to register because of his religious beliefs or the dictates of his own conscience. You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948, under the circumstances then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the Selective Service Act of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the second count of the Indictment."* (Record page 169.)

Taking the foregoing instruction as a whole and juxtaposing the contention of petitioner that he "merely supported" Rickert with the direct reference to the accom-

plishment of the offense, it becomes immediately clear that the jury had to conclude that their duty was to convict petitioner even though he did nothing more than subsequently support Rickert in his decision of non-registration.

In the face of these instructions to the jury, how can the government in fact or in law contend that "it was within the jury's province to find that petitioner told Rickert 'not to register', and did not merely offer comfort or moral support to Rickert in the position he had been led by his conscience to take." The jury was *directed* to find Gara guilty if no more than mere support was proven, and this case must be decided on that basis.

III. This Court's Decision by Upholding the Court of Appeals Singles Out the Selective Service Act as Directed Against the Free Exercise of Religion as a Continuing Offense Which Runs Forever and Ever.

The Petitioner contended before the Trial Court and before the Court of Appeals that he could not be guilty of the offense charged against him, namely, counselling Rickert; who refused to register; who was indicted; who pleaded guilty and who was sentenced for his refusal to register on September 10, while petitioner did not even meet Rickert until after the 20th of September. The Court of Appeals in its opinion says (pages 203 and 204 of the transcript):

> "Since Rickert, at the time of his arrest, did not in words decline to register on November 8, it is contended that his offense was complete on September 10, 1948, Appellant further urges that his advice on November 8 that Rickert should not permit himself to be coerced into changing his mind could not affect Rickert's action nor constitute a violation of the statute; that the indictment does not properly charge the offense and that the evidence does not sustain the conviction.

> "These contentions are untenable. Rickert's failure to perform his obligation to register constituted a completed offense on September 10, but it was repeated on every day thereafter during the period involved herein, for he was under a continued duty to register."

We do not know what the Court of Appeals means "that the offense was repeated during the period involved herein", but we know that our contention set forth in our brief is based on the opinion of the Court of Appeals that if the offense of non-registration is a continuing one, then a non-registrant may be sent to the penitentiary for five years for each day of "the period involved herein."

The opinion of the Court of Appeals also shows that the Government's argument is not well taken when it is stated that:

> "There is no merit in the argument that the regulation makes each day of refusal a separate crime." (Page 15 of the Government's brief.)

As a matter of fact and law, albeit a bad one, on the basis of the Court of Appeals opinion, it may be considered that the regulation makes not each day of refusal, but each hour and even each minute of refusal a separate crime.

We do not believe that the decision by this Court intended to establish the above as the law of this land, but it does by upholding the judgment of the Court of Appeals.

The Court of Appeals says:

> "The fact that appellant sincerely believed that it was his Christian duty to oppose registration does not absolve him from the violation of the Statute. The rights of religion are not beyond limitation." (Citing cases.)

We respectfully submit, as we did during our oral argument when questioned by Mr. Justice Reed, that it is up to this Court to decide whether or not the constitutional provisions guaranteeing the free exercise of religion stand or it must fail by upholding the judgment of the Court of Appeals. We respectfully submit that the Selective Service Act of 1948, as it was applied by the Court of Appeals to this petitioner, leaves only two choices, namely to declare that the Act is unconstitutional, or that the Constitution does not mean what it says as to free exercise of religion.

The Court of Appeals also adjudged that:

> "The District Court did not err in charging that it was immaterial whether appellant succeeded in dissuading Rickert from registering. It is immaterial * * * whether appellant did or did not make a practice, as he contends, of counselling only those who were 'inwardly fixed' in their conscience to refuse to register."

This holding by the Court of Appeals is wholly at variance with the decision of this Court in *United States* v. *Ballard*, 322 U. S. 78.

The judgment of the Court of Appeals now upheld by this Court says:

> "Also the District Court properly charged that it was not necessary to prove that appellant actually brought about Rickert's violation of the statute if his words were used in such circumstances and were of such a nature that they would have a tendency to cause Rickert to refuse to register."

Such a holding is wholly contrary to the decision of this Court in the case of *Terminiello* v. *Chicago*, 69 S. Ct. 894. The Court of Appeals opinion which is upheld by this court further says:

> "Nor do we think that appellant's argument that the

> Selective Service Act violates his constitutional right of free speech on the ground that it restricts freedom of speech and that there is no clear and present danger (Cf—*Terminiello* v. *Chicago,* 337 U. S. 1) justifying such restriction, can be sustained. The cited case involved an ordinance which, as construed by the trial court, directly invaded freedom of speech. The Selective Service Act does not even purport to enter the field of restriction of speech or of publication."

It is hard, if not impossible, to follow the Court of Appeals since petitioner was convicted and his conviction was upheld because he said to Rickert, fifty-eight days after Rickert refused to register, "Good Luck, Charles. Don't let them coerce you to change your conscience." It is hard, if not impossible, to distinguish the holding of this Court in the *Terminiello* case, *supra,* as applied to Terminiello, and as it was applied by the Court of Appeals to petitioner.

That the freedom of speech constitutionally guaranteed was negated by the Court of Appeals in the case of petitioner is apparent because the opinion says (page 207 of the transcript):

> "Appellant may attack the Selective Service Act of 1948 from every platform in America with impunity, but he cannot, under the guise of free speech, nullify it by disobedience to its express provisions."

Conclusion.

This petitioner respectfully prays that the Court's decision cannot be justified upon the grounds set forth in the opinion of the Court of Appeals that was upheld by the decision of this Court. In order to reach the decision as the Court of Appeals did, it must be said that petitioner will stand as a felon just because he exercised his freedom of speech, said certain things that had "the tendency" to

actuate someone (Rickert) to act as he did fifty-eight days before petitioner said the incriminating words.

To hold with the Court of Appeals, it is necessary to say that a non-registrant acting in accordance with his conscience and in accordance with his free exercise of religion, is guilty of the offense "during the period involved herein," whatever that period may mean.

To hold with the Court of Appeals, it is necessary to say that the constitutionally guaranteed free exercise of religion does not exist as against the Selective Service Act of 1948.

To hold with the Court of Appeals, it is necessary to say that lack of intent to commit a crime will make the crime nevertheless accomplished. It will be necessary to overrule various cases heretofore standing unchallenged as they were set down by this Court.

The petitioner and others believe that they are entitled to learn from this Court the answer to the questions so raised by petitioner. The Quakers[1] and Brethren and the Mennonites and members of other peace churches,[2] are entitled to know whether or not they are all law violators when they support their fellow church members who, for the sake of conscience and religious belief, refuse to register.

---

[1] On July 22, 1948, the Religious Society of Friends in the United States had urged their members numbering some 100,000 "to support young Friends and others who expressed their opposition to conscription either by non-registration, or by registration as conscientious objectors. We warmly approve civil disobedience under Divine compulsion * * *."

[2] These organizations also felt that this is a case in which petitioner was convicted for simply advocating following the promptings of conscience.

The brief of the American Friends Service Committee states at page 4:

> "We believe it is important for the Supreme Court of the United States to pass upon the issues of religious freedom involved in this case and to determine *whether or under what circumstances it can be made a criminal offense in the United*

Because of the far reaching importance of the decision of the Court of Appeals now upheld by the decision of this Court, petitioner respectfully requests that the decision of this Court of October 23, 1950, be withdrawn and that he be granted a rehearing in this case.

Respectfully submitted,

LARRY GARA,
Petitioner,
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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

FRANCIS HEISLER,
One of the Attorneys for Petitioner.

States to counsel others that it is right to obey God rather than man."

The brief of the Ohio Pastors Convention states at page 2:

"Great numbers of Christian ministers today are profoundly concerned about what appears to them, in this decision of the Court of Appeals, to be a deeply serious abridgment of that which they believe to be one of their most inalienable rights as Christian ministers, namely, *the right to counsel lay members of their churches and fellowships to adhere to the decisions of the individual conscience.*"

FILED
MAR 23 1950
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949,

LARRY GARA,
Petitioner and Appellant-Defendant Below,
vs.
UNITED STATES OF AMERICA,
Respondent and Appellee-Plaintiff Below.

BRIEF AMICUS CURIAE OF THE OHIO PASTORS CONVENTION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949,

No. 609.

LARRY GARA,
Petitioner and Appellant-Defendant Below,
vs.

UNITED STATES OF AMERICA,
Respondent and Appellee-Plaintiff Below.

BRIEF AMICUS CURIAE OF THE OHIO PASTORS CONVENTION.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

IDENTITY OF AMICUS CURIAE.

The amicus curiae filing this brief is the Ohio Pastors Convention.

In February, 1950, 2,000 protestant ministers whose churches are members of the Ohio Council of Churches,

met for the annual Ohio Pastors Convention at Columbus. The convention adopted a resolution authorizing this brief. This resolution appears in the appendix to this brief.

Great numbers of Christian ministers today are profoundly concerned about what appears to them, in this decision of the Court of Appeals, to be a deeply serious abridgment of that which they believe to be one of their most inalienable rights as Christian ministers, namely, the right to counsel lay members of their churches and fellowships to adhere to the decisions of the individual conscience.

II.

STATEMENT OF MATTERS INVOLVED.

The petitioner Larry Gara was convicted of counseling, aiding, or abetting a student who refused to answer some draft questions and sign a draft card. He counseled his student to "stand by his convictions". Gara was dean of men at Bluffton College and administered his counsel in that capacity. Members of the organization filing this brief stand in the shoes of Gara because they also are professional counselors to young people as ministers.

III.

REASONS FOR ALLOWANCE OF THE WRIT.

A. The decision of the Circuit Court of Appeals for the Sixth Circuit upheld the constitutionality of Section 462(a) of the Selective Service Act of 1948 which, as interpreted by the lower courts, prohibits mere speech

advocating following conscience when conscience dictates refusal to register, even in the absence of clear and present danger to the state. The constitutionality of Section 462(a) restricting speech involves an important question of federal law which has not been, but should be, settled by this court. Text of the section appears in the appendix.

B. The decision of the Circuit Court of Appeals holding that the presence of "clear and present danger" was determinative by the Congress of the United States is a decision of law in conflict with decisions of this court holding such to be a judicial yardstick.

C. The decision of the Circuit Court in abandoning the "clear and present danger" test to the legislature so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

D. The opinion of the Circuit Court is based upon evidence of acts not charged in the indictment, irrelevant to the acts charged and erroneously admitted as evidence of intent.

IV.

THE QUESTION PRESENTED.

Is Section 12(a) [50 U. S. C. App., 462(a)] of the Selective Service Act of 1948 as interpreted below unconstitutional as violative of the First Amendment?

Amicus curiae believes that it is.

V.

ARGUMENT.

1. Section 462(a) of the Selective Service Act as interpreted is unconstitutional because in express terms it flatly restricts freedom of speech and freedom to advocate religious beliefs in the absence of a "clear and present danger" to the state.

2. The finding of the existence of a clear and present danger is a rule of law which may not be abandoned to Congress under the constitutional division of powers among the three branches of government.

1. The statement for which Gara was convicted took place on the campus of Bluffton College in conversation with a student. When an FBI agent and a deputy sheriff came to arrest the student (Charles Ray Rickert) because he had not registered, Gara appeared and said, "Stand by your convictions. Don't let them coerce you into registering" or words to the same effect. There had been previous consultations between Gara as dean of men and the student at this Mennonite college and the advice was of similar purport—to wit, that the student should follow his conscience, even though it told him not to register.

The effect of Section 462(a) as applied in this case by the Circuit Court of Appeals is to prohibit individual religious counsel to adhere to the promptings of conscience, when that conscience conflicts with the military draft. It puts the state above God, a source of trouble since time immemorial. Section 462(a) provokes this conflict unnecessarily and under circumstances devoid of any clear and present danger to the state. As the

Supreme Court of the United States said in **Girouard v. United States,** 328 U. S., 61, 68-9:

> "Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the state. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in **United States v. Ballard,** 322 U. S., 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. **Board of Education v. Barnette,** 319 U. S., 624.'"

The overt counseling in the Gara case was mild compared to the incitations to violence of **Terminello v. Chicago,** 337 U. S., 1. Terminello's speech was held to be protected. Gara's acts were milder than the circumstances in **DeJonge v. Oregon,** 299 U. S., 353 (1937). The law of this case, we contend, should have been followed in **United States v. Gara.** This court with Chief Justice Hughes writing the opinion reversed the conviction of DeJonge. He was convicted of the violation of the Criminal Syndicalism Law of Oregon. The act defined "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution". DeJonge had presided at a Communist party meeting attended by about 225 persons.

Apropos of the right to peaceably assemble, and freedom of speech and the press, the United States Supreme Court said on page 364 of this opinion:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights

> themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our constitutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.
>
> "It follows from these considerations that, consistent with the Federal Constitution, peaceable assembly for lawful discussions cannot be made a crime. The holding of meetings for peaceable political action cannot be prescribed. * * *."

Under the foregoing statement of the law in **DeJonge v. Oregon**, the speech and counsel of Gara was protected by the First Amendment. The indictment against Gara read:

> "Or about the eighth day of November, 1948, at Buffton, in the Northern District of Ohio, Western Division, Larry Gara knowingy counseled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the Selective Service Act of 1948."

The operative fact was simply that, on November 8, 1948, when an FBI agent and deputy sheriff arrested Rickert on a warrant for having refused to register two months previous, Gara said to him, "Stand by your principles. Don't let them coerce you into registering."

The speaking of those words was the alleged crime.

There was no mass meeting, there was no incitation to violence. There was merely counsel from an older man, who had known at first hand the hardships of im-

prisonment for conscience, to a young student; that he should obey his conscience, submitting if need be to civil penalties for actions conscientiously dictated.

It may be here said that the vice of the trial, the conviction and the affirmance by the Circuit Court (178 F. (2d), 38) was that Gara was tried for and convicted of, not uttering the foregoing remarks on the date charged in the indictment, but of entirely separate and distinct actions at different times and places from those charged.

Masquerading as evidence of his intent, in speaking the words on which the charge was based, proof was admitted of actions, documents and evidence entirely unrelated to the matter charged. These extraneous matters occupied most of the trial, most of the prosecutor's argument to the jury, most of his brief to the Circuit Court and most of the opinion of that court. Prejudicial evidence and argument were imported into the case: (1) that Gara made a speech advocating refusal to register. This speech was in Reading, Pa., not Bluffton, Ohio. It was in August, not on or about November 8, 1948; (2) that Gara had written letters stating that he had advocated refusal to register. These letters were not addressed to or even proved to have been seen by Charles Ray Rickert. In fact they were addressed to various public officials in protest against their official acts.

The weight to be accorded the freedoms of speech and religion has been variously stated in recent cases. In **Thomas v. Collins**, 323 U. S., 516, 530, they were said to occupy a "preferred place" balancing "the usual presumption supporting legislation".

Again it has been said:

> "* * * without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be

> enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. **Kovacs v. Cooper**, 93 L. Ed. Adv., 391."

In this case, however, it is hardly necessary to seek any "preferred place" or special "momentum for respect" in balancing the rights protected by the First Amendment against any clear and present danger to the state. Here we seek no special exemption on the ground of conscience for those who refuse to register as Rickert did. All **amicus curiae** seek is the right to say that one should act conscientiously even though the results may include inconvenience, hardship, sacrifice, or civil penalty. To make that statement presents no danger that is both clear and present. Thus as applied to Gara Section 462(a) is clearly invalid. It falls within not only the opinion of the majority of the court in **West Virginia State Board of Education v. Barnette**, 319 U. S., 624, but also within the prohibitions of the dissent. It is, in fact, a disguised assault upon dissident views, 319 U. S., 653, a statute whose intrinsic legislative purpose is to discourage a particular religious creed. It therefore is "within the constitutional restrictions imposed on legislatures and cannot stand". 319 U. S., 651.

2. **The finding of the existence of a "clear and present danger" is a rule of law which may not be abandoned to Congress under the constitutional division of powers.**

Transcending the harm to Gara, the Circuit Court of Appeals abandoned to the legislative branch of government the right to determine when a clear and present

danger to the state existed when it held in the Gara opinion "On the question of whether a clear and present danger existed, requiring the enactment of the statute, the Congress is the judge." (178 F. (2d), 38, 41.) This is subversive of the division of powers in the government. Clear and present danger is a judicial yardstick formulated by Associate Justice Oliver Wendell Holmes in **Shenck v. The United States**, 294 U. S., 47 (1919). The judicial yardstick of clear and present danger set a limitation upon the freedoms guaranteed under the First Amendment yet it demarked an area of lawful speech. Abandonment of the yardstick to the legislature would deprive the courts of the tool by which it protects the First Amendment.

Thus:

> "• • • judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. **Thomas v. Collins**, 323 U. S., 516, 531-2."

Respectfully submitted,

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Attorneys for Amici Curiae.

APPENDIX.

The resolution adopted at the February, 1950, annual Ohio Pastors Convention at Columbus, Ohio, was as follows:

> "We express our sympathetic concern in the Gara case inasmuch as it involves basic rights of American citizenship. We pledge our moral support of those religious groups who are seeking justice in this particular case.
>
> And because of its far reaching implications to all of us as Christian ministers, we urge that the United States Supreme Court consider this case, and that the Public Affairs Committee of the Ohio Council of Churches be requested to communicate this action to the United States Supreme Court in the most effective manner."

The 50 U. S. C. App., 462(a) in its material portions reads as follows:

> "Any * * * person * * * who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title * * * shall, upon conviction * * * be punished by imprisonment * * * or a fine * * * or by both such fine and imprisonment * * *."

FILED
MAR 8 1950
CHARLES ELMORE CRO
CLE

IN THE

Supreme Court of the United States

October Term, 1949.

No. [redacted] 19

LARRY GARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, INC., AS FRIEND OF THE COURT.

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HAROLD EVANS,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 609.

LARRY GARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, INC., AS FRIEND OF THE COURT.

American Friends Service Committee, Inc., is a non-profit corporation. It is an agency of the several branches of the Religious Society of Friends (Quakers) in the United States conducting religious, philanthropic and relief work in the United States and foreign countries. Eight days before the Selective Service Act of 1948 became a law, the American Friends Service Committee issued the following:

"MESSAGE TO OUR FELLOW AMERICANS

"'I told them I knew from whence all wars arose . . . and that I lived in the virtue of that life and power that took away the occasion of all wars. . . .'

—GEORGE FOX (Founder of the Society of Friends), 1650.

"For three hundred years the Society of Friends has striven to maintain this testimony of its founder. The American Friends Service Committee had its first beginnings in an effort to provide opportunities for young men who in the midst of World War I opposed war and sought to live 'in that life and power'. It has now had more than thirty years of experience in this form of religious service. By offering opportunity for a wide range of services at home and abroad it has sought to release those forces in the world that prevent war. This it will continue to do.

"We of the Committee do not hold this position merely because it has been held in the past; it depends upon our conception of God and of God's relation to man, and upon our belief that no plea of necessity or of policy, however urgent or peculiar, can avail to release either individuals or nations from the paramount allegiance which they owe to Him who hath said, 'Love your enemies'.

"It is a grave responsibility to stand before a world which relies on military force and to assert that such reliance can never lead to creative peace. But, faced with the possibility of conscription for military service, we feel an obligation now, in peacetime, to make our opposition to conscription a matter of record with our government and with our fellow citizens.

"Moreover, we stand ready to offer our ministry of aid and counsel to all who for religious or conscientious reasons stand opposed to conscription and war. We recognize that their opposition might take such forms as non-compliance with the law; counseling non-compliance with the law; choosing non-combatant or alternative civilian service; insisting on using their technical knowledge for constructive rather than destructive purposes.

"In taking this position we believe that we can best live out our highest responsibilities as citizens of our country. We believe that the power of such a way of life might set our country on a new course of understanding among all peoples. Such a way awaits only the devotion of consecrated men and women. This call we make to our fellow citizens.

"June 16, 1948."

By reason of the long-established principles of the Religious Society of Friends relative to the issues of war and military service, members of this Committee are impelled to continue to offer a ministry of aid and counsel to all who for religious or conscientious reasons stand opposed to conscription and war. We recognize now as in 1948 that their opposition may take such forms as non-compliance with the law or supporting on conscientious grounds those whose loyalty to God's will as revealed to them has led them to refuse to register for military service.

This Committee is deeply concerned with this case on two grounds. It is concerned to support the petitioner, a member of the Religious Society of Friends, who for religious and conscientious reasons has supported a non-registrant in placing loyalty to God above his duty to register under the Selective Service Act.

But the Committee is far more concerned with the bearing of this case on the broad issues of religious freedom. If this decision is the law of the land, many members of the Religious Society of Friends and others who place their duty to God above their duty to the State, are made violators of the law, subject to fine and imprisonment unless they betray their deepest religious faith and convictions.

It is of some significance that out of the sixty-six young men who have been convicted for failure to register under the Selective Service Act of 1948 thirty-seven are members of the Religious Society of Friends, fourteen are members of other Protestant denominations and less than ten are

those who would be usually classed as "political" or "humanitarian" objectors.

We believe it is important for the Supreme Court of the United States to pass upon the issues of religious freedom involved in this case and to determine whether or under what circumstances it can be made a criminal offense in the United States to counsel others that it is right to obey God rather than man.

(1) Among the questions to be decided is whether a mere refusal to register is an offense under the Selective Service Act of 1948. The United States Court of Appeals for the Second Circuit has held that it is not an offense merely to refuse to sign the registration card, in view of the fact that the Selective Service Regulations provide that if a man appears but "is unable or refuses to sign" the registration card the registrar shall sign for him and consider him registered (Regulation 613.13 (c)).

United States v. Norton decided January 19, 1950, and not yet reported.

Upon this basis the ruling of the lower courts that Ricket's non-registration in the case at bar was a continuing offense is error and would require a reversal of the judgment.

(2) Another important question is whether under an indictment charging counseling a named individual not to register evidence may be introduced, as it was here, of statements and letters written by the defendant, without showing that the non-registrant ever knew of such statements and letters.

(3) A third important question is whether the lower courts were in error in holding that the defendant was guilty if his words "would have a tendency to cause a refusal of duty as required by the Act" (R 167) even if they had no such effect.

(4) A fourth question of even greater import is whether a restriction on religious liberty such as is here involved is constitutional in the absence of evidence of any clear and present danger.

For these reasons we earnestly hope that certiorari may be granted.

Counsel for both parties have consented to the filing of this brief.

AMERICAN FRIENDS SERVICE COMMITTEE, INC.,

By CLAUDE C. SMITH,

HAROLD EVANS,
Both of the Pennsylvania Bar,
Its Attorneys.

FILED

MAY — 8 1950

IN THE

Supreme Court of the United States

October Term, 1949.

No. 69

LARRY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

On Writ of Certiorari to the United States Circuit Court of Appeals
for the Ninth Circuit.

MOTION FOR LEAVE TO FILE A
BRIEF IN BEHALF OF
THE AMERICAN FEDERATION OF LABOR AND
CIO,
AMICUS CURIAE.

CHARLES C. SMITH,
of the Pennsylvania Bar,
HAROLD EVANS,
of the Pennsylvania Bar,
Counsel.

International, 25 Chestnut St., Phila., 5, Pa.

IN THE

Supreme Court of the United States.

October Term, 1949.

No. 609.

LARRY GARA,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF IN BEHALF OF THE AMERICAN FRIENDS SERVICE COMMITTEE, INC., AMICUS CURIAE.

American Friends Service Committee, Inc., is a non-profit corporation. It is an agency of the several branches of the Religious Society of Friends (Quakers) in the United States aiding and conducting religious, philanthropic and relief work in the United States and foreign countries. The nature of this Committee's interest in this case is set forth in the brief filed by this Committee as *amicus curiae* on the Petition for Writ of Certiorari.

Certiorari was granted April 3, 1950. The Solicitor General on April 11, 1950, declined to consent to the filing of a brief on the merits by this Committee *amicus curiae*. The petitioner has consented.

This Committee is deeply concerned with this case on two grounds. It is concerned to support the petitioner, a member of the Religious Society of Friends, who for religious and conscientious reasons has supported a non-registrant in placing loyalty to God above his duty to register under the Selective Service Act.

But this Committee is far more concerned with the bearing of this case on the broad issues of religious freedom. If this decision is the law of the land, many members of the Religious Society of Friends and others who place their duty to God above their duty to the State, are made violators of the law, subject to fine and imprisonment unless they betray their deepest religious faith and convictions.

We believe it is important that the issues of religious freedom involved in this case be fully presented so that this Court may determine whether or under what circumstances it can be made a criminal offense in the United States to counsel others that it is right to obey God rather than man.

(1) Among the questions to be decided is whether a mere refusal to register is an offense under the Selective Service Act of 1948. The United States Court of Appeals for the Second Circuit has held that it is not an offense merely to refuse to sign the registration card, in view of the fact that the Selective Service Regulations provide that if a man appears but "is unable or refuses to sign" the registration card the registrar shall sign for him and consider him registered (Regulation 613.13 (c)). *United States v. Norton,* 179 F. 2d 527.

Upon this basis the ruling of the lower courts that Rickert's non-registration in the case at bar was a continuing offense is error and would require a reversal of the judgment.

(2) Another important question is whether under an indictment charging counseling a named individual not to register evidence may be introduced, as it was here, of statements and letters written by the defendant, without showing that the non-registrant ever knew of such statements and letters.

(3) A third important question is whether the lower courts were in error in holding that the defendant was

guilty if his words "would have a tendency to cause a refusal of duty as required by the Act" (R 167) even if they had no such effect.

(4) A fourth question of even greater import is whether a restriction on religious liberty such as is here involved is constitutional in the absence of evidence of any clear and present danger.

These are grave issues. They vitally affect this Committee and the Religious Society of Friends. We believe this Court deserves to have these issues fully presented, and that we are likely to present the broad issues of religious liberty more fully and objectively than petitioner.

We earnestly request permission to file a brief on the merits as *amicus curiae*.

AMERICAN FRIENDS SERVICE COMMITTEE, INC.,

By CLAUDE C. SMITH,
HAROLD EVANS,
Both of the Pennsylvania Bar,
Its Attorneys.

OCTOBER 23, 1950.

Per Curiam Decisions.

No. 19. GARA *v.* UNITED STATES. Certiorari, 339 U. S. 927, to the United States Court of Appeals for the Sixth Circuit. Argued October 13, 16, 1950. Decided October 23, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Francis Heisler* argued the cause for petitioner. With him on the brief was *Stanley U. Robinson, Jr. John W. MacDonald* was also of counsel. *Philip R. Monahan* argued the cause for the United States. With him on the brief

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were *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg* and *Robert S. Erdahl.* Reported below: 178 F. 2d 38.